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CRIMINOLOGY

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Criminology

PROBLEMS & PERSPECTIVES

(3)

AHMAD SIDDIQUE

Faculty of Law
University of Delhi

foreword by
LOTIKA SARKAR



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FOREWORD

It is indeed a pleasure to write the Foreword to the book on Criminology by my colleague Ahmad Siddique. He is eminently suited to writing this book as this has been a subject which he has taught for a number of years and been greatly interested in.

The subject of Criminology has assumed great importance as the question of Crime Prevention and the Treatment of Offenders is engaging the attention of legislators, jurists and sociologists in most countries. The days when retribution was regarded as the determining factor in inflicting punishment has, as Mr. Siddique points out, "lost much of its ground in the context of modern and more enlightened views on the functional value of penal law". There is a growing awareness that very often a person committing a crime is not a free agent, as Mr. Siddique explains in the chapters dealing with Crime Causation. The aim of penal administration should therefore be to help a person to rehabilitate and reform himself, as otherwise it would be "prejudicial to the larger interests of the society as a whole" (Dua, J.). Mr. Justice Krishna Iyer, who has in a number of judgments pointed out the need for a sympathetic approach, has said that in a "scientific system....the focus (is) not only on the crime but also on the criminal, and....to personalise punishment....the reformatory component is as much operative as the deterrent...."

Mr. Siddique points out the difficulty faced by the criminologist, as there is no unanimity about the definition of crime for the purpose of this subject. A legal definition is hardly an indicator about the state of the individual as there are bound to be many crimes where "there are some exceptional situations or there is negligence or is a social welfare offence based on strict responsibility". He, therefore, favours the definition given by Stephen as an "act which is forbidden by law and revolting to the moral sentiments of society". He also cautions against the tendency of using Criminal Law as a norm-setter because it results in many offences remaining only on the statute book unimplemented and therefore does not even succeed in bringing about an attitudinal change. He cites as examples the

Sarda Act and the Dowry Prohibition Act.

In the second and third chapters, the author has given the various theories of crime causation. Instead of merely explaining them, he has tried, wherever feasible, to link them to Indian conditions. For example, explaining Merton's theory of anomie, he cites the example of Indian students using unfair means in the examination to achieve "success" as "the goals are more important than the means to achieve those goals". Similarly discussing Bonger's theory of crime he cites statistics to illustrate the direct nexus between poverty and criminal behaviour in India. Mr. Siddique, however, has reservations about Bonger's theory as he opines that according to this theory "the phenomenon of crime should have come to an end or at least controlled to a very great extent in socialist countries like the USSR which is not at all the factual position". He has, perhaps, overlooked the fact that even though there are crimes and criminal courts in the socialist countries, the traditional crimes of violence, sex and property, which Bonger dealt with, have been reduced to a minimum.

Following the various theories of crime causation, the author evaluates the various kinds of punishment prevalent today as well as the ones proposed by the Law Commission or suggested in the Indian Penal Code (Amendment) Bill, 1972. In Chapter 10—Sentencing Process—he deals in greater detail with the advantages and disadvantages of some of those sentences like imprisonment—short and long, and fine. In his discussion on Capital Punishment, he clarifies the position that in spite of the controversy in India regarding its abolition and the reluctance of the legislature to recommend it, the legislative trend (Criminal Procedure Code) as well as the judicial approach has succeeded in limiting it to the very minimum.

Dealing with the question of fine, he draws attention to the anomalous position which arises when a fine has been imposed as a punishment on a person who is unable to pay it due "to incapacity of the offender or the lack of means". Even though Section 64 I. P. C. legally enables a court to give the alternate of a prison sentence in case of non-payment of fine, the magistrates by mechanically suggesting an alternate sentence of imprisonment in all sentences of fine have defeated the underlying principle of the provision.

The effect has been that though the sentence was meant to be one which would keep the person out of prison, he ultimately goes there and comes out with the stigma of a prison sentence because no thought was ever given to finding out the facts about the ability of the person to pay. While sentencing a person to paying a fine judges would do well to remember the words of Dua, J. that "true dictates of justice seem to us to demand that all the attending relevant circumstances should be taken into account for determining the proper and just sentence"

In the chapter on Therapeutic Approach, Mr. Siddique has stressed on the importance of both prison reforms and parole. Understandably he has given probation the most important place in this approach. The Probation of Offenders Act, which became law in 1958, has been described as a "milestone in the progress of the modern liberal trend of reform in the field of penology" (Subba Rao, J.) but the proper implementation has not yet taken place, owing to the lack of awareness on the part of the Judiciary. This was very forcibly mentioned by Mr. Justice Krishna Iyer when he said : "The ghosts of Macaulay and men of his ilk haunt our criminal courts still, so much so, probation still fares ill in the law courts. Twenty-five years of freedom have not freed our judiciary from the obsolescent British Indian penology, bearing on suppression and crime." Mr. Justice Sikri has also stressed the need for both the Judiciary and the Bar to be fully aware of the advantages of probation but has regretted that "very little serious attention is paid to this aspect by the Judiciary or the Bar". By his critical evaluation of some of the cases under the Probation of Offenders Act, Mr. Siddique has more than proved these observations. He has done more. By giving the figures of the number of probation officers in the various States and the number of persons placed under supervision, he has shown that only an attitudinal change of the Judiciary will not suffice. Supporting machinery is required and unless there are more qualified probation officers, the two most important objectives—reformation and rehabilitation—cannot be implemented.

The need for an enlightened judicial approach so that the steps taken towards a more enlightened criminal policy is not defeated is the provision requiring the magistrate to give a hearing to the accused on the question of sentence. This would partly

remedy the lacuna in the "processual system (where) there is neither comprehensive provision nor adequate machinery for collection and presentation of the social and personal data of the culprit...." (Krishna Iyer, J.) and would go a long way in helping the judge to awarding the right sentence. Mr. Siddique has pointed that though this cannot be a substitute for a "system based on pre-sentence reports" it will give some scope to the sentencing issues. But from recent reports it would appear that magistrates have not appreciated the policy underlying the legislative innovation in the Criminal Procedure Code.

In a detailed chapter on the Police, Mr. Siddique has dealt with all aspects of their working as well as the law which governs them. In substantiating some of the weaknesses in their working, he has given data e.g. he has given very detailed figures about the number of police stations and the number of police attached to them, in order to prove that "the position is very uneven as between the urban and rural areas". He has also referred to the image the police have in dealing with the problems of the minority groups. But he has been objective in his observations because quite clearly he mentions the grievance of the police force about political interference in their working. Among other examples, he cites the circular of the West Bengal Government to the police not to take any action when there is a gherao.

The great credit of the book is the comprehensive manner in which Mr. Siddique has dealt with all aspects of the subject including a simple, concise chapter on jurisdiction, evidentiary and procedural rules governing criminal cases. Wherever feasible he has given figures and statistics to substantiate his observations. His presentation is simple and lucid and written for the Indian reader. I venture to hope that many of the problems he has raised will be discussed not only by students and teachers but will be thought-provoking even for the policy makers.

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PREFACE

There is no dearth of standard books on criminology and penology by eminent foreign writers. What, however, prompted me to write the present volume has been the realisation on my part of the fact that hardly any work is available with the Indian context providing the frame of reference. Again, almost all the works dealing with the subject, even in the foreign context, have been primarily written keeping in view the requirements of the students of sociology and social work. They, therefore, lack the legal treatment which is so essential to the understanding of the practical application of various principles through Courts of law and other agencies. The significance of the legal bias can be appreciated by keeping in view the fact that Criminology is now taught as a subject both at LL.B. as well as at LL.M. level in the Indian Universities. Recently the Supreme Court of India, while delivering the judgment in an appeal relating to the sentencing process, has emphasised the importance and utility of the training of judicial personnel in modern penology. This book attempts to deal with the various problems of Criminology on the basis of the factors mentioned above. In the process, comparison of the situation obtaining in India has been made, wherever possible, with that of other countries, particularly the U. S. A. and England.

As will be readily noticed, the endeavour has been to present a broad, comprehensive view of the subject, rather than dealing intensively with a segment of it. This is especially true of the chapters relating to the causation of crime. Even so, intensive, coverage, wherever desirable, has been maintained in areas concerning probation, punishments, juvenile delinquency and police. The chapter on 'Criminal Law and its Administration' on the other hand seeks to provide only a broad and general picture of Criminal law and its process to enable a non-lawyer to appreciate the fundamentals of criminal justice.

In addition to providing basic information on the subject, this study attempts to define issues, to raise questions and to an overall picture emerging out of these issues, questions

possible answers. I have not hesitated to express my personal opinions on the various debatable issues dealt with in the book.

The person to whom I am most indebted in writing this book is Prof. Lotika Sarkar, my senior Faculty colleague with whom I have been associated in teaching criminal law and criminology in the Delhi University over a number of years. Apart from contributing the Foreword to the book, she made various constructive suggestions which I found extremely useful.

I am also grateful to Mr. Surendra Malik, Editor, Supreme Court Cases, for the great personal interest which he evinced in the preparation and publication of the book.

Finally, a word of deep appreciation to my wife, Zarina, who not only provided the necessary inspiration and the proper working conditions for writing the book but also helped me in preparing the index, bibliography and the table of cases.

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Chapter I

CRIME AND CRIMINOLOGY

Crime is inevitable in any human society since some violation or the other of any code of conduct prescribed for the members of a society is bound to occur. Not only is crime inevitable but, paradoxical as it may sound, some sociologists have gone to the extent of saying that crime, to some extent, helps in promoting social solidarity among people constituting the society. The inevitability and universality of the phenomenon of crime has been described by Emile Durkheim in the following words:

There is no society that is not confronted with the problem of criminality. Its form changes; the acts thus characterized are not the same everywhere; but, everywhere and always, there have been men who have behaved in such a way as to draw upon themselves penal repression. . . . No doubt it is possible that crime itself will have abnormal forms, as for example, when its rate is unusually high. This excess is indeed, undoubtedly morbid in nature. What is normal, simply, is the existence of criminality, provided that it attains and does not exceed, for each social type, a certain level. . . . To classify crime among the phenomena of normal sociology is not to say merely that it is inevitable, although regrettable, phenomenon, due to incorrigible wickedness of men, it is to affirm that it is a factor in public health, an integral part of all healthy societies.¹

According to Durkheim, even a society composed of persons possessing angelic qualities would not be free from some violations of the norms of that society with the result that faults which appear venial to the layman will create there the same scandal that the ordinary offence does in ordinary consciousness.

Be that as it may, the fact remains that crime is a phenomenon which is of primary concern to every member of the

1. Emile Durkheim: CRIME AS A NORMAL PHENOMENON.

human society. The concern for crimes and criminals is reflected in various forms of curiosity among people. First there is the idle curiosity in certain minds where the object is not so much as to understand something seriously about crime but just to get some sort of thrill or kick out of it. This need is generally catered by horror comics, movies based on violence and through other means of mass media. There are many who expect spicy crime reporting in their newspapers just as they expect their breakfast every morning. It is a curious fact of life that crime, something horrible in itself, should provide so much relief and recreation to many when written about in fiction or portrayed in movies or on television.

There are some persons whose interest in crime may be slightly more concrete and meaningful in the sense that they do ponder over the problem for a while without being seriously interested in pursuing it subsequently. Then there is the practical curiosity which is shown by those who have to deal with criminals in an official capacity, like the police and prison officials, but that too remains unproductive since the curiosity is seldom channelized into organized research or systematic study and, therefore, generally results in unreliable speculation.

The kind of curiosity which is the basis of interest in criminology can be termed scientific curiosity. This type of curiosity is concerned with the quest for answering various questions relating to crime, its causation, and the response by the society to the challenges posed by it. The answers thus provided form the basis of general theories of criminology.

The significance and extent of the crime problem, and hence the utility of criminology, may be gauged by the following crime figures in India during the past few years for some of the more serious offences.

During the year 1971, 16180 murders, 9647 cases of kidnappings and abductions, 29,595 cases of robbery and dacoity and 3,35,204 offences of theft were reported to the police in the country. The estimated value of the property involved in the crimes committed in 1971 amounted to around Rs. 3,85,456 millions.²

2. CRIME IN INDIA, 1971, Government of India Bureau of Police Research and Development, Ministry of Home Affairs, New Delhi.

The tentative figures available for 1973 disclose 16788 murders, 5639 culpable homicides not amounting to murders, 9624 kidnappings and abductions and about 28,000 cases of robbery and dacoity.

Crime : Legal and Social Definitions

The starting point of the discussion, like any other area of study, is to define and delimit its subject-matter. This has to be done, at least to some extent, despite the fact that it is difficult to appreciate a definition without knowing something about the subject in the first instance, and definitions should be attempted towards the end rather than in the beginning of the discussion of a subject.

The most convenient starting point to understand the nature and scope of criminology is obviously the concept of crime itself since the subject concerns itself with the study of crime and criminals from various perspectives.

The most obvious way of defining crime is in legal terms, to distinguish it from sin, religious and moral wrongs. Legal definition gives a basic premise in which the pitfalls resulting due to individual or group opinions are avoided to give, as far as possible, a scientific and precise character to criminology. Paul W. Tappan defined crime as 'an intentional act or omission in violation of criminal law, committed without defence or justification, and sanctioned by the law as felony or misdemeanour'³. It appears, however, that the definition could conveniently be reduced to "an act or omission in violation of criminal law", since any defence or justification is to be found within the criminal law, and there is no question of violating the criminal law if some defence or justification is available for a particular act or omission in certain circumstances. Further, it is not necessary for an act or omission to be intentional in order to be a crime; it could be made punishable on the basis of knowledge, recklessness or negligence or even without any reference to the mental element of the wrongdoer *i.e.* based on the concept of strict responsibility.

There is, however, another school of thought which considers the legal definition to be inadequate and unsuitable for the purpose of criminology. It insists on giving a definition which is

3. CRIME, JUSTICE AND CORRECTION, p. 10.

broader as compared to the legal definition and is called social definition. Crime accordingly is defined as 'an act which the group (social) regards as sufficiently menacing to its fundamental interests, to justify formal reaction to restrain the violator'⁴. Raffeale Garofalo, one of the three leading exponents of the Italian school of criminology, rejected the "juridical" conception of crime which according to him fails in that it both includes and excludes behaviour properly encompassed in a "sociological notion of crime". For his sociological purpose, he formulated his theory of "natural crime". By "natural crime" he meant the acts which offend the basic moral sentiments of pity (revulsion against the voluntary infliction of suffering on others) and probity (respect for property rights of others).⁵

It is interesting to note that the exponents of each one of the above schools accuse the other of being unscientific in approach. The legal definition has been criticised on the ground that whether any act or omission is recognized as a crime at a given time in a society depends upon values which are relative and not on any intrinsic worth of the act or omission and that makes the study of crime unscientific. As aptly commented upon by an advocate of sociological approach, the categories set up by the criminal law are of a "fortuitous nature" and do not arise intrinsically from the nature of the subject-matter the scientists attempt to analyse.⁶ This charge of variation in the legal attitude towards the various acts is countered by the supporters of the legalistic approach by pointing out that not only do the legal norms vary due to various circumstances but also all the social norms which are essentially relative and impermanent. It is pointed out that criminal law not only gives precise definitions of forbidden acts but also has the machinery and procedure to determine the violations and, therefore is able to identify the offenders, which is not possible in cases where certain conduct is branded as criminal in social terms irrespective of prevailing legal notions. This certainly is the advantage in the legal definition over the social one despite the various inherent weaknesses of criminal law processes like non-prosecution of many offenders, the possibility of false conviction, greater possibility of failure to convict all guilty persons and of innumerable

4. Elener Hubert Johnson : CRIME CORRECTION AND SOCIETY, p. 11.

5. Francis Allen : BORDERLAND OF CRIMINAL JUSTICE, p. 67.

6. Thorsten Sellin : CULTURE, CONFLICT AND CRIME, p. 21.

cases remaining unreported to the police. The best exposition of the case for legal definition has been made by the lawyer-sociologist, Paul W. Tappan in the article "*Who is the Criminal?*" in the following words :

The validity of this contention (based on social definition) must depend, of course, upon what the nature of the subject-matter is. These scholars suggest that, as a part of the general study of human behaviour, criminology should concern itself broadly with all anti-social conduct, behaviour injurious to society. We take it that anti-social conduct is essentially any sort of behaviour which violates some social interest. What are these social interests? Which are weighty enough to merit the concern of the sociologist, to bear the odium? What shall constitute a violation of them? Particularly where, as is so commonly true in our complicated and unintegrated society, these interests are themselves in conflict? Roscoe Pound's suggestive classification of the social interests served by law is valuable in a juristic framework, but it solves no problem for the sociologist who seeks to depart from legal standards in search of all manner of anti-social behaviour. However desirable may be the concept of socially injurious conduct for purposes of general or abstract description, it does not define what is injurious. It sets no standard. It does not discriminate cases, but merely invites the subjective value-judgment of the investigator.⁷

It is because of the 'confusion' caused by the social definition that the use of the expression 'white collar crime' by Prof. Sutherland irks Tappan. He clinches the issue in favour of the legal definition by observing that convicted criminals represent the closest possible approximation to those who have in fact violated the law even if this group may not be complete or fully representative of all those who have committed crime. Further, the criminal law establishes substantive norms of behaviour, standard more clear-cut, specific, and detailed than the norms in any other category of social controls.

Basis of Criminalization

Even if the legal definition of crime is accepted in preference to some other possible ones for the study of criminology, it does not provide any guide as to what kind of human conduct should be

7. American Sociological Review, (February 1947), Vol. 12, pp. 96-102.

declared 'criminal'. True that in most of the crimes there is the common element of immorality and the harmful nature of the acts constituting crime. This is particularly true of the traditional crimes like murder, theft, rape, etc. known as *mala in se*. But there are various other offences in which there is no element of immorality in the traditional sense, known as *mala in prohibita* and, on the other hand, there are many acts which are not crimes despite the element of immorality being present in the accepted sense. To illustrate the latter category, it may be mentioned that adultery is not an offence in England and incest as such is not punishable in many countries. What conduct should be made criminal depends not only on the question whether the conduct is moral or immoral but also on the considerations of the possibility of its implementation through the legal machinery.

As regards the question of the moral quality of an act, the question arises as to who is to determine it? Should it be decided by the law-giving body in a society or should it be judged with reference to the hypothetical 'average' person of that society? Is it possible to divide morality into two compartments of public and private morality and to leave private morality untouched by law as recommended by Wolfendon Committee in England? The committee observed that the function of criminal law is to preserve public order and decency, to protect citizens from what is offensive or injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are young, weak in body or mind, inexperienced, or in a state of physical, official or economic dependence. It is not the function of the law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behaviour further than is necessary to carry out the above purposes.

To answer the fundamental points raised in the above recommendation, a reference may be made to the lively debate between Lord Devlin and Prof. H.L.A. Hart regarding the extent to which criminal law ought to be applied in dealing with human behaviour. Lord Devlin, while attacking the Wolfendon Report which recommended legalisation of homosexual activity between consenting adult males since it was a matter of private morality, maintained that criminal law ought not to be confined to the

preservation of order and decency and the protection of the lives and property of the citizens. In his view criminal law should also be used to sustain the public morality without which it is impossible to have an integrated society. Any act which is beyond the tolerance of society, as reflected through an average person, should be the concern of criminal law and there should be no theoretical limits to the State power against immorality. Durkheim, the illustrious French sociologist, has subscribed to the same view in his *DIVISION OF LABOUR IN SOCIETY* by saying that enforcement of public morality is necessary for social solidarity which is symbolised by penal law.

Prof. H.L.A. Hart in a powerful rejoinder has exposed some of the weaknesses inherent in the arguments advanced by Lord Devlin. He is convincing in pointing out that it is not enough for making an act criminal that it is intolerable to an average person because of 'indignation' and 'disgust' caused to him.

Surely the legislature should ask whether the general morality is based on ignorance, superstition or misunderstanding, whether there is a false conception that those who practice what it condemns are in other way dangerous or hostile to society; and whether the misery to many parties, the blackmail and other evil consequences of punishment, especially for sexual offences, are well understood.

Prof. Hart rightly asserted that two questions must be answered in the affirmative before declaring an activity as criminal.

Firstly, whether the activity which offends moral feeling is harmful, independently of its repercussions on the general moral code?

Secondly, whether the whole moral fabric of the society would go to pieces if the offending act is not made criminal?

Apart from the issue whether the State is justified in tackling those activities through criminal law which essentially pertains to private morality, the problem is also to be looked into from a practical angle. Even if it is conceded that the State, as suggested by Lord Devlin, has no theoretical limits to prevent and punish immorality, the more pertinent point is to evaluate the practical limits of the State in the area. Surely it is one thing to make an activity criminal but quite a different thing to enforce it.

It is common knowledge that many offences, for all practical purposes, are confined to the statute books and the laws are not enforced either because there is no will to enforce them or the criminal law machinery is inadequate or unsuitable to enforce them. The Sarda Act was passed in this country about fifty years ago but child marriage, in violation of the Act, is even now a common phenomenon in India, particularly in rural areas. Similarly, anti-dowry and anti-untouchability laws have proved to be somewhat futile attempts to change the attitudes of people in social areas where criminal laws' potential is next to nothing. As Sutherland observes :

Laws have accumulated because the mores have been weak and inconsistent ; and because the laws have not had the support of the mores they have been relatively ineffective as a means of control. When the mores are inadequate, the laws are ineffective.⁸

Lack of effective enforcement of the criminal law dealing with offences like homosexuality, abortion and gambling creates problems both for the law as well as for the person whose conduct comes within the prescribed category. It results in contempt and cynicism towards law in general because the condemnation of the prohibited conduct is only in word and not in deed. The hypocrisy inherent in such a situation has been brought out very aptly by Thurman Arnold :

These laws are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.⁹

The effects of such laws which are seldom enforced are formidable on the person involved in the prohibited activity. Black-mailing is just one such problem faced by the offenders in this type of offences in general and homosexuality in particular. In a House of Lords debate in 1954, the Right Honourable Earl of Jowitt remarked that, during his term as Attorney-General "at least 95 per cent of the cases of blackmail which came to my knowledge arose out of homosexuality".

It is ironical that in offences like homosexuality, abortion and drug addiction the offender should himself become the victim

8. Edwin Sutherland and Donald Crassey : *PRINCIPLES OF CRIMINOLOGY*, 6th Ed. (1960), p. 11.

9. *SYMBOLS OF GOVERNMENT*, (1936) p. 160.

law even in cases where no prosecution is brought against him or he is not even identified as an offender. The way his personality is damaged has been well summed up in the following words :

But the impact on the deviant of this criminalization of his behaviour transcends any actual experience of official reaction. Even when he is not publicly identified and officially dealt with he is only too aware that his behaviour is legally proscribed as well as socially disapproved. Sensing that he is different or is doing an unusual act is one thing, feeling that his act is strongly disapproved is another, and knowledge that he has become a law-breaker yet another.¹⁰

If the person involved in the proscribed behaviour of the types discussed above is so much damaged in his psychic structure without prosecution or even formal identification, certainly the damage is of higher degree in a case where prosecution takes place since the 'status-degrading ceremony' is bound to alter his image not only in the eyes of others but also in his own.

In the words of Harold Gaifinkels :

The work of denunciation effects the recasting of the objective character of the perceived other. The other person becomes in the eyes of his condemners literally a different and new person...the former identity stands as accidental ; the new identity is the "basic reality". What he is now is what "after all, he was all along".¹¹

It is, therefore, imperative that criminal law should not act with misplaced overzeal. It should come into the picture only when it becomes necessary and where it can provide an appropriate and effective machinery to cure the intended evil.

Criminology : Nature And Scope

As must be obvious from the preceding discussion, the concept of crime is a highly debatable issue and the subject-matter of criminology also varies accordingly both in its nature and scope since broadly speaking, criminology is the systematic study of crime in all its aspects. Criminologists like Sutherland, Gellin

10. Edwin M. Schur : CRIMES WITHOUT VICTIMS, p. 5.

11. "Conditions of Successful Degradation Ceremonies", American Journal of Sociology, Vol. 61 (March 1956), pp. 421-22.

and Clinnard have either rejected the legal definition or have extended the criminological researches beyond the limits of criminal behaviour laid down by law. Among those who have opposed such approach are Paul Tappan and Jerome Hall who are of the opinion that criminology is synonymous with the sociology of criminal law. The view that crime is an undesirable social behaviour is in particular reflected in the field of juvenile delinquency since delinquency is a wider term than criminality. The procedure in a juvenile court is very different from the ordinary one and a juvenile offender does not enjoy many constitutional and procedural rights which are enjoyed by adult offenders.

Even when the word crime is used in the legal sense by criminologists, it is not all types of violation of criminal law which would fall within the domain of criminology as the proper subject of study. It is obvious, for instance, that no systematic study would either be expedient or even needed relating to situational offenders who commit an offence in some exceptional situations but as such cannot be said to have criminal tendencies. For instance, a husband killing his wife or her paramour on grave and sudden provocation arising out of their illicit relationship is not a criminal in the ordinary sense. Again there are crimes which are not committed wilfully but the responsibility is either assigned because of negligence or because the offence is one of strict responsibility *i. e.* punishable without any reference to the mental state. In the contemporary society many offences have been created which are known as 'social welfare' offences based on strict responsibility. They are different from traditional crimes and, therefore, *mala in prohibita* and not *mala in se*. It appears that the definition of crime as given by Stephen conveys the nature of acts which are the proper subjects of criminology. According to him, crime means an act which is both forbidden by law and revolting to the moral sentiments of the society.¹²

There has been a debate as to whether penology and corrections should be included in the discipline of criminology. In its narrower sense, criminology involves the study of crime *i. e.*, the forms of crimes, their extent and the causative factors responsible for them. In its wider sense it also includes penology, the study

12. GENERAL VIEW OF CRIMINAL LAW OF ENGLAND, p. 3.

of punishment and of similar methods of dealing with crime, and of the problem of preventing crime by non-punitive measures.¹³

According to Marvin E. Wolfgang, penology and correction are fit subjects for criminology only if scientific methods involving studies, predictions and experiments are employed in these areas. Pure issues of practice and administration relating to penology and correction are not included in the field of criminology.

May we legitimately include "corrections" or "penology" under our meaning of criminology? The answer, I believe, should be negative if by "corrections" is meant the social work activities of probation and parole officers, the organization and administrative functions of the police, or the management of penal institutions. The answer should be affirmative, however, if we mean, as previously indicated, the scientific analysis, measurement, and interpretation of patterns, regularities, causal or associational relationships and probabilities of the same sub-areas of criminology. If control and prediction in experimentation are integral goals of research and, regardless of the substantive areas, if analysis proceeds by means of the scientific method, then we may include within the scope of criminology any correctional research that embraces these goals and this method. Matters purely of public administration may have peripheral interest but do not constitute a science of crime. Technical operations in the management of a police force or of a prison do not fall within our framework of reference to criminology...¹⁴

Elucidating the above, Wolfgang further observed :

The juvenile court judge who would make use of the "Social Prediction Scale" devised by the Gluecks and suggested them as an appropriate guide in sentencing, is not engaging in a scientific pursuit. What the Gluecks have done is Criminology; what the Judge does with the results of Criminology is public administration.....¹⁴

A question often raised is as to whether criminology is a science or not. The answer will be determined by the use which we want to make of criminology. (There are two schools of sociology. The positive school, founded by August Comte visualized sociology as an instrument which could be used as an

13. Mannheim: COMPARATIVE CRIMINOLOGY, p. 3.

14. "Criminology and Criminologist", Journal of Criminal Law, Criminology and Police Science, 1963, Vol. 54, No. 2, pp. 156-158.

instrument for reorganizing human life. The German school of sociology developed on lines opposite to Comte. Max Weber regarded sociology as value-free, that it does not give answers as to how people should behave. According to this approach, a science cannot be value-oriented and the purpose of scientific sociology is to understand social events and not to suggest value-oriented solutions. It appears, therefore, that criminology can be a science if the only aim is to study crime, criminal, criminal law and prisons *etc.* The advocates of the German school, therefore, conclude that studies of criminals and prisons will never tell us how we ought to treat the criminal any more than studies of the atom will tell us how we ought to use the atomic bomb.¹⁵

As regards the problem of explaining crime and criminal behaviour, Bentham, Beccaria, Garofalo, Lombroso, Ferri, Tarde, Durkheim and Bonger have been the pioneers in this area. In the field of custody and treatment of criminals, which involves penology, the pioneering work has been done by Haviiland, Maconochie, Doe, Aschaffenburg, Ray and Mandslay.

Two schools of criminology with diverse views on the nature and causation of crime and theories of punishment have been in existence since the 18th and 19th centuries. The first which was established by Bentham and Beccaria, is known as the classical school while the other, known as the positivist school, was established in the 19th century by Lombroso, Garofalo and Ferri of the Italian school. The main points of difference between the two schools are as follows :

1. While the classical school defined crime in legal terms, the positive school rejected the legal definition and developed the social definition.
2. The classical school believed in free-will theory *i. e.*, a person was free to choose between right and wrong conduct. The positive school, on the other hand, maintained that under a particular set of conditions a person was bound to commit a criminal act and hence is not a free agent to choose between the different options.

15. Clarence Ray Jaffery: *The Historical Development of Criminology*, in PIONEERS OF CRIMINOLOGY.

3. The classical school believed in the deterrent effect of punishment. The positive school, however, stood for the replacement of punishment by scientific methods for the protection of society.
4. The classical school focussed its attention on the crime while the positive school laid greater emphasis on the personality of the offender.

The contribution of the positive school to the contemporary criminological and penological thought notwithstanding, the basic structure of criminal law continues to be based on the theories propounded by the classical school. Even today, broadly speaking, it is crime which continues to be the focus of attention of the agencies of criminal law administration though some changes have been effected to emphasise the personality of the offenders. This change in thinking is largely reflected in the area of juvenile delinquency and the corrective and rehabilitative techniques introduced in the penal system as will be evident in some of the later chapters.

Hereditcal School

Chapter II ✓

EXPLANATION OF CRIME—INDIVIDUALISTIC APPROACHES

✓ As a result of barbarity and arbitrariness in the criminal law and its processes in Europe in the 18th century, the classical school represented by Bentham and Beccaria came into existence. Bentham propounded the theory that maximum happiness of the maximum number should be the basis of all laws and punishment should not be more than what is necessary in a case. Beccaria (1735-94), an Italian nobleman and mathematician, influenced by the above principles known as utilitarian hedonism, argued that punishment should be just severe enough to overbalance the pleasure derived from the illegal act, and punishment, being an evil in itself, should not exceed more than what is absolutely necessary to produce the desired effect on the criminal and society. Using these theories as weapons, Beccaria fought a grand battle against the trend for severe punishment for crimes such as adultery, sodomy and the murder of illegitimate children. In his urge for detection of the sources from which these crimes sprang, he was in fact raising a fundamental question as to why certain types of crimes were committed and this was despite the fact that Beccaria belonged to the school of free-will theory. As a result of Beccaria's work and wholehearted support given to him by a great thinker like Voltaire, the rigours of criminal law were reduced in many European countries and capital punishment was abolished in quite a few of them.

On account of the good work done by Beccaria, interest grew towards crime and criminal, resulting in the appearance of the neo-classical school by the middle of the 19th century. This school was responsible for emphasising that the mental element ought not to be ignored while dealing with certain types of offenders. As a result protections were accorded to child and insane

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were the result of the same processes operating on the basis of various social and physical factors.

It is not surprising therefore that Lombroso has been praised as well as criticised extensively for his theories to explain criminal behaviour. As mentioned earlier, he has been designated as the putative father of modern criminology because of his pioneering work dealing with the personality of criminals. Critics like Lindesmith and Levin believe, however, that he, because of his faulty assumptions, hindered the progress of scientific criminology.³

Ferri, the second among the three major positivists, is closer to the contemporary line of thinking since apart from anthropological factors he also took into account geographical, psychological and economic factors while explaining criminal conduct. He classified criminals into five categories: insane criminals, born criminals, habitual criminals, criminals by passion and occasional criminals. The first category is of those who act criminally due to congenital reasons. The habitual criminal, though showing atavistic tendencies, is also influenced by social and physical environments. Criminals by passion are otherwise fit but commit the criminal act due to impulse, anger or jealousy and feel repentant subsequently.

Regarding the punishment of offenders, Ferri provided its basis in his positivist system of social defence. In this he emphasised two elements. Firstly, he emphasised the individualisation of the offender by pointing out that the choice of means of social defence would be different for the different classes of offenders. In case of imprisonment he was of the view that indefinite periods should be prescribed keeping in view the potential harm the person is capable of and the chances of his readjustment in the society. Indeterminate sentences, with maximum period limits, now prevalent in U. S. A. and some other countries, represent the same philosophy in sentencing.

Garofalo was a magistrate, a senator and a professor of criminal law. He defined "natural crime" as conduct which

3. For a detailed criticism, see A. Lindesmith and Y. Levin: "*The Lombrosian Myth in Criminology*", *American Journal of Sociology*, 42 (1937), pp. 653-71.

offends the basic moral sentiment of pity and probity. Garofalo constitutes with Lombroso and Ferri what has rightly been called a kind of trinity, though Garofalo is different from the other two due to his political and penal conservatism. In his major treatise known as the *CRIMINOLOGY*, he divides criminals into four classes. "Endermic" criminals are murderers who commit offences characteristic of their locality or crimes out of passion. "Criminals deficient in probity" are thieves. "Lascivious criminals" perpetrate crimes against chastity and the "violent criminals" are affected by such environmental influences as "préjudices of honour, politics and religion".

Garofalo rejected the common belief that punishments deter potential offenders in their acts. He, however, admits the value of criminal penalties in a more subtle fashion by providing and reinforcing general moral attitudes toward certain forms of conduct. The law, by making such behaviour unrespectable, subjects the individual to powerful extralegal sanctions of public opinion.

No doubt for many persons the consciousness of the evil involved would destroy any pleasure which the criminal act might afford and is, therefore, sufficient to cause abstention from crime. But even these persons involuntarily think of the extralegal social reaction attendant upon the offence, namely by their honest neighbours, and this thought is continually strengthening their resolution to abstain from the acts in question.⁴

Garofalo was quite sceptical about the reform of criminals. He was greatly influenced by social Darwinism in his attitude towards criminals. As in nature, so it is in society, only the fittest have the right to survive. He, therefore, favoured death as the most efficient means of eliminating criminals. He realised however that public opinion would not support death penalty except in case of murder. He, therefore, recommended imprisonment and transportation in cases other than of murder and was of the opinion that criminals ought to make good through money payments, the material and moral damage caused by their crimes.

4. Quoted in Francis Allen: "THE BORDERLAND OF CRIMINAL JUSTICE" p. 85.

Lombroso's Theories and Subsequent Researches

Lombroso's theories received a severe jolt as a result of the studies made by Charles Goring which revealed that there was no significant difference between the physical characteristics of criminals and non-criminals and also among criminals of different kinds. This was stated by Goring in *THE ENGLISH CONVICT*, 1913, a statistical study in which he compared measurements of 37 specific physical characteristics of some 3,000 English recidivist prisoners with similar measurements of university students, hospital patients and members of the British army.

Studies made by Eavert A. Hootan and William H. Sheldon sought to give a new lease of life to the theories which were dependant on physical deformity in criminals but failed, as will be evident from the following discussion. As a result of the study of 13,873 male criminals in various American States and a control group consisting of 3023 persons, Hootan concluded :

Criminals are organically inferior. Crime is the resultant of the impact of environment upon low grade human organism.

According to him criminals were characterised by low and sloping foreheads, thin lips, compressed jaw angles, straight hair, thin beard and body hair, thick hair on the head, red brown hair, blue-grey and mixed coloured eyes, nasal bridges and tips varying to both extremes of breadth and narrowness, protruding and small ears, tattooing, long thin necks and sloping shoulders. Hootan, however, failed to demonstrate as to why he regarded these traits as 'organically inferior'.

Hootan also tried to establish some nexus between the physical characteristics of the offenders and the type of offences committed by them. His study disclosed that murderers and robbers were of tall and thin stature ; thieves and burglars were undersized while sexual offences and assaults were committed by persons of short and heavy constitution. George B. Vold, in his *THEORETICAL CRIMINOLOGY* contradicts such a nexus by pointing out that half of the prisoners studied by Hootan were convicted of different offences earlier.

Another notable effort to connect criminal tendencies with certain physical traits was made by William H. Sheldon. He

classified the human constitution into three types which he called endomorphic, mesomorphic and ectomorphic. The first *somotype* is represented by round, soft, fat bodies with short tapering limbs and small bones; the second type is reflected in muscular bodies with large trunk, heavy chest, large wrists and hands and heavy bones; and the third is shown in lean and delicate bodies, drooping shoulders, small face and delicate bones. Sheldon found the delinquent to be predominantly mesomorphic. He rejected the legal definition of delinquency as inadequate for a dynamic society and good enough for a "Ph. D. thesis in Sociology" only. He substituted an undefined expression 'disappointing performance', in place of delinquency, which has rightly been held as bizarre by some critics. As regards the findings on the basis of physical characteristics, it has rightly been pointed out that he did not employ any control group for the purpose of comparison with non-criminals.

There is yet another defect as pointed out by Marshal B. Clinnard in the studies undertaken by Hootan and Sheldon. The two have different ideas regarding physically inferior type of people. To Hootan the criminal is an inadequately developed, runty fellow, while Sheldon chooses the husky and athletic type as the typical criminal.⁵

Finally, Sheldon and Eleanor Glueck made some studies applying the test of *somotype* on delinquent and non-delinquent schoolboys of Boston and found the presence of mesomorphic traits among the delinquents having "some sort of internal disharmony" conducive to delinquency. However their general observation that "it should be even more evident that there is no unit cause of delinquency" denies physical peculiarity as a form of determination of criminal behaviour.⁶

Commenting on the inadequacy of the physical theories, Gabriel Tarde made the tart comment:

This school, intoxicated with the wine of natural sciences, lacks the dry, substantial bread of historical and social sciences.

5. SOCIOLOGY OF DEVIANT BEHAVIOUR (1963), p. 124.

6. Elener Hubert Johnson: CRIME, CORRECTION AND SOCIETY, p. 114.

Mental deficiency

The next most popular explanation based on individualistic traits is in terms of mental deficiency in criminals. There was a time when no distinction was made between mental deficiency and insanity as maintained both in law and medicine today till the distinction was made clear by two psychologists, Jean E. D. Esquirol in France and Isaac Ray in U. S. A. in the eighteenth and nineteenth centuries respectively.

Various studies have been made to determine the relationship between mental deficiency and criminal behaviour by employing psychometric tests. Henry H. Goodard found mental deficiency in almost half of all criminals while Goring was convinced that mental deficiency was a major cause in all criminal behaviour except the ones requiring some cleverness as in the case of fraud. Goddard's figures are not supported by 395 studies made in America and reported by Sutherland. Mary Woodward examined all the studies pertaining to the relation between low intelligence and crime and was convinced that low intelligence does not play any significant role in delinquency.⁷ It will be more correct to say that mental deficiency does not play any direct role in the causation of criminal tendency in a person but indirectly it may be relevant because social adjustment can be more difficult for persons with low intelligence.

Psychoanalytical approach

The psychoanalytical approach is based on certain concepts formulated by Sigmund Freud. According to him *id* is the source of basic biological drives in a human-being and is present at the time of birth and also operates in the unconscious state. Throughout life the *id* constantly seeks expression of a social drive. The viewpoint that we are all potential criminals is not peculiar to psychoanalytic approach alone but has been expressed by many other philosophers and writers. The great German thinker Goethe observed once: "There is no crime of which I do not deem myself capable." Dostoievsky in his novel 'BROTHERS KARAMAZOV' wrote:

Nobody in the world can be the judge of the criminal before he has realised that he himself is as much a criminal as

7. "The Role of Low Intelligence in Delinquency", British Journal of Delinquency, Vol. 5, pp. 281-303 (April, 1955).

the one who confronts him Everyone pretends to hate evil, but deep down they all like it, all of them.

The ego is the conscious personality, an attitude which grows out of contact with the material and social world. Arising out of relations of the *id* and the ego, the *superego* reflects the mores of the group shaping the individual's social experience. The *ego* mediates between *id*, the control from the *superego*, and social processes within the community. With basic weakness of *ego* or when ego function is impaired due to fatigue, physical illness, intoxication, psychological conflict or any other cause, personality problems arise resulting in socially disapproved behaviour.

In times of social upheaval, the restraints exercised by society are diminished while temptations are increased. External restraints against antisocial behaviour are weakened as a result of inefficient corrupt law enforcement resulting in an increase in the crime rate. For example, during the Boston police strike in the U. S. A., an immediate rise in the number of crimes was produced.

The difficulty in the application of psychoanalytical approach in cases of individual criminal behaviour is the fact that it is quite difficult to examine the actual mental state of a person with the tools available to psychoanalytical sciences at present.

Physiological approach

There is yet another approach which has been sought to explain the criminal behaviour in terms of glandular malfunctioning. The persons connected with endocrinology, in its heyday in the early part of the present century, made efforts to study the connection between glandular functions and human conduct with a zeal which was probably not warranted.

Many factors, social and scientific, gave rise to this approach to explain criminal behaviour. It was around the same time that great progress was made in biochemical and other scientific researches. Taft and England have made the following succinct observations in the American context :

While the great body of endocrinological findings were reported and interpreted with traditional scientific restraint, a number of workers in the field, perhaps caught up in their own enthusiasm, began sensationalizing their science by advocating its application as a panacea for social problems.

biological or psychological traits. It cannot, however, be denied that the constitutionalists focussed attention on the personality of the criminals for the first time, which was a step in the right direction towards modern criminology.

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Chapter III

EXPLANATION OF CRIME—ENVIRONMENTAL APPROACHES

As opposed to the individualistic approaches which focus attention on the biological, mental and other characteristics of the offender to explain the cause of his delinquent behaviour, there is the sociological approach which seeks to explain the phenomenon of criminal behaviour with reference to factors outside the personality of the delinquent. The subject-matter for criminal behaviour analysis is extended from the individual delinquent to the community, social institutions and group relationships which shape both criminal and non-criminal behaviour. This approach does not subscribe to the view that offenders generally are abnormal, biologically or psychologically, and does not seek to identify the causes as if they are enclosed within the body of offender. Instead, criminal behaviour is looked upon as resulting from social interactions.

Social and Sociological Study of Crime and Criminals

Environmental approaches may take two forms. One is to make a sociological study of crime and criminals with reference to society *i.e.* its organisation and culture, and the other is to find the causative factors of crime in the institutions of society like family relationships, educational institutions, economic relationships, organized religion and means of mass communication.

Criminality : A Result of Imitation

Gabriel de Tarde, the French jurist and social psychologist, provides the starting point of the explanation of crime in terms of social factors. The importance of his contribution to criminology is primarily due to the fact that he was the first criminologist who offered a social explanation of crime while others were banking on physical traits of the offenders. Just as Lombroso was the

putative father of scientific criminology, Tarde is considered the father of social psychology.

Tarde criticised and even ridiculed the theories of his contemporary, Lombroso. He compared the detection of criminality on the basis of physical traits by Lombroso with the detection of divinity by Tibetan priests in a newborn baby on the basis of appearance while choosing the future great Lama. He observed:

From the social point of view crime may be monstrosity but not from the individual or organic point of view, because it is the absolute triumph of egoism and of the organism over the brakes of society. The man who is a true born criminal could thus be nothing more than a very fine animal, a sample which was a credit to his race.

Tarde did not think that even psychological criminals were unique compared to non-criminals. According to him criminal behaviour is the result of a learning process. A person *learns* criminal behaviour just like any other trade which he picks up in his childhood.

The majority of murderers and notorious thieves began as children . . . and the true seminary of crime must be sought for upon each public square or each crossroad of our towns. . . in those flocks of pillaging street urchins who, like bands of sparrows, associated together, at first for marauding and then for theft . . . without any natural predisposition on their part, their fate is often decided by the influence of their comrades.

It is fairly apparent that Tarde's theory was the precursor of the modern ecological and differential association theories, to be discussed later in this chapter.

✓ **Social Disorganisation Theories** ✓

Social change is inevitable in a dynamic society and though not bad in itself, it results sometimes in disharmony, conflict and cultural dichotomy. This is specially true when the social change happens to be of a fast pace. Social change may in such a situation, produce what is called 'social disorganization'.

Social disorganization has been defined as a decrease of the influence of existing social rules upon individual members of the

group. This phenomenon is different from the violation of social rules by individuals, because that is something normally expected in even relatively stable societies where not much damage is possible due to effective social sanctions, including criminal law. The consequences brought about by the second world war, like industrialisation, modernisation and urbanization have, in many countries, caused breakdown of traditional patterns of social organization in them. In India, the social change has taken place at a fast rate during the period extending to about 30 years after independence and though the volume of crime is very low as compared to many other countries, its rate has already gone up in urban areas, particularly big cities.¹ The village society in India is still what is called the 'sacred' society by sociologists; people are bound together by caste and kinship and social sanctions are powerful. There is no anonymity of the individual as found in the bigger cities and the chances of any deviation are limited in such an environment. Industrialisation and urbanisation are causing substantial migration to cities and the hold of social kinship is slackening. This process, in itself good and desirable, is also resulting in relaxation of some social sanctions which were sometimes more effective in curbing antisocial behaviour than criminal law.

Social disorganization may result due to cultural conflicts between different values of different sections of society. The difference may be between old and new values, local and imported values and traditional values and the values imposed on a community by the government or other agencies. Two studies relating to the Polish peasants settled in the U. S. A. and the Eskimos serve as interesting illustrations. Thomas and Znaniecki found a vast difference in the old and new value system among the most disorganized group of Polish peasant settlers in the United States. The members of the group no longer had the urge to continue to cherish their status on the basis of family but had developed highly individualistic tendencies. They developed taste for luxurious things like fashionable clothes and liquor which they were not willing to share with the other members of the group.

1. During the period from 1960 to 1971, the population increased by 27.4% while the increase in the incidence of crime was of the order of 57.3% as reported in 'CRIME IN INDIA, 1971', Government of India, Bureau of Police Research & Development.

Under the influence of the new environment, the 'we-attitudes' based on peasant-family values changed into highly hedonistic individualistic attitudes.²

Ruth and Jordan Cavan have collected data regarding incidences of delinquency in many countries while studying the effect of social complexity problem on the crime situation in those countries.³ The Cavans found that Eskimos were free from the problem of delinquency until recently, but the situation changed as a result of movement to towns, increase of social contacts with non-Eskimos and the resultant breakdown of the traditional social structure. The deviant behaviour was largely reflected in loitering, drunkenness and impermissive sexual attitudes.

The process of social disorganization is also sometimes explained on the grounds of 'cultural lag'. Cultural lag means that sometimes the various components of culture in a society grow unequally resulting in a gap between those components. It is said, for instance, that machines and scientific inventions are developing at a much faster pace than other cultural components, say, relating to behaviour, thus resulting in deviant behaviour.

The theories of social disorganization have been criticised on the ground of lack of objectivity in using concepts like 'disorganization' and 'cultural lag'. It is pointed out that the question whether a society is organized or disorganized involves subjective enquiries. It is also argued that to say that some components of culture go ahead of others is also a matter of opinion. For instance, as observed by Lewis Mumford, it may be that machine technology (increased capacity to kill in war) is the laggard while non-material culture (a deeper sense of humanitarianism and concern for the underprivileged people of the world) is the pacesetter.

Differential Association and Criminality

The theory of criminality based on 'differential association'

2. William J. Thomas and Florian Znaniecki: *THE POLISH PEASANT IN EUROPE AND AMERICA*.
3. *DELINQUENCY AND CRIME: CROSS-CULTURAL PERSPECTIVES* (Philadelphia: J.B. Lippincott Co., 1968).

has been presented by Sutherland, which he summarized as follows⁴:

A person becomes delinquent because of an excess of definitions favourable to violation of law over definitions unfavourable to violation of law. Criminal behaviour is explained as a product of learning in interaction with other persons, principally within intimate personal groups. It is assumed that any person inevitably assimilates the surrounding culture unless other patterns are in conflict.

Sutherland does not think that delinquents are disorganized and hence has no use for the expression 'social disorganization'. He prefers instead the term 'differential group organization'. In other words, according to Sutherland, there were in fact two types of organizations operating within the community namely, organization for criminal purposes and organization against criminal activities.

Sutherland maintained that so far as the learning process was concerned, it was the same for both criminal and non-criminal conducts. Some techniques relating to the commission of crimes may be learnt through association with criminals alone but others are acquired in the normal course of education since it is not the difference between criminal and non-criminal techniques as such which matters but the particular use made of them. So what is actually needed to develop criminal behaviour in many instances is not the crime-committing technique but some sort of rationalization to use the techniques for criminal purposes. This rationalizing capacity is learnt through the association with criminals which gives him definitions justifying his deviant conduct.

Various criticisms and questions have been directed towards Sutherland's theory of differential association. Firstly, it has been said that not all those persons who come in contact with criminals become criminals themselves. Quite rightly Sutherland found the answer in the counteracting influence of contact with anti-criminal groups. In other words, the *definitions* provided by the contact with anti-criminal groups happen to be more persuasive in their case than the ones provided by the contact with criminals. Another connected question posed is that

4. Edwin H. Sutherland and Donald R. Crassey.

once initiated, why does not criminal behaviour increase indefinitely until everyone is a criminal? Once again Sutherland has no difficulty in answering it on the basis of his concept of differential group organization. The measures taken by the anti-criminal group organization, as a result of the threat of crime posed by the opposite group, are effective enough to curb the delinquent tendencies.

There has been much criticism that the differential theory cannot be extended to all crimes. Thus it has been said that the theory does not apply to rural offenders, to white collar criminals, to perpetrators of "individual" and "personal" crimes, to irrational and impulsive criminals, to "occasional", "incidental" and "situational" offenders, to murderers, non-habitual criminals, to persons who commit crimes of passion, and to men whose crimes were perpetrated under emotional stress.⁵ In fairness to Sutherland it must be said that some of the above types of criminals like situational offenders and those who commit crime under some emotional stress, are not really 'criminals' to warrant a study in criminology and even theories other than of differential association would find it difficult to explain them in terms of any particular causative factor. Crassey argues that most of the comments above are not based on research and therefore, "criticisms" actually are proposals for research.⁶

Another criticism has been that Sutherland meant "contact" when he used the term "association" and thereby implied that physical proximity with the criminal was being referred to. This probably was not exactly what Sutherland wanted to convey. What he meant by "association" is made clearer by Daniel Glaser who reconceptualises Sutherland's theory using the term "differential association". According to him, most individuals are believed to identify themselves with both criminal and non-criminal persons in the course of their lives. They may have first-hand experience in delinquency groups. They may identify with criminal roles presented in fiction, movies, television, or the press. They may react against any criminal group.⁷

5. All these have been catalogued by Donald R. Crassey in his article, *The Development of a Theory: Differential Association* in which he defends Sutherland.

6. *Ibid.*

7. Elmer Hubert Johnson: *CRIME, CORRECTION AND SOCIETY*, p. 1

One of the principal criticisms against the theory of differential association is that it does not adequately take into account the "personality traits", "personality factors", or "psychological variables" in criminal behaviour. Sutherland took this kind of criticism seriously, and in an early period he stated that his theory probably would have to be revised to take account of personality traits.⁸ Later on he pointed out what he believed to be the fundamental weakness in his critics' argument: "Personality traits" and "personality" are words that merely specify a condition, like feeble-mindedness, without showing the relationship between that condition and criminality. He posed three questions for advocates of "personality traits" as supplements to differential association: (i) What are the personality traits that should be regarded as significant? (ii) Are there personal traits, to be used as supplements to differential association, which are not already included in the differential association? (iii) Can differential association, which is essentially a process of learning, be combined with personal traits, which are essentially the product of learning? Sutherland did not attempt to answer these questions, but the context of his discussion indicates his belief that differential association does explain why some persons with a trait like "aggressiveness" commit crimes, while others possessing the same trait do not.⁹

It is paradoxical, though true, that sometimes the very norms which are laid down by society for achieving conforming behaviour, tend to produce just the opposite result in the form of criminal behaviour. According to Robert Merton's theory of anomie, the delinquency (and other forms of deviance) is a response to the unavailability of conventional or socially approved routes to success, and is characteristic of lower-class persons since the social structure strains the cultural values, making action in accord with them readily possible for those occupying certain status within the society and difficult or impossible for others.¹⁰ The term anomie was used by Merton for a condition in a social system when cultural regulation of behaviour is weakened. In other words what is encouraged in society is the "success" and so

8. THE SUTHERLAND PAPERS, 1956, pp. 25-27.

9. Donald Crassey: THE DEVELOPMENT OF A THEORY: DIFFERENTIAL ASSOCIATION.

10. Robert K. Merton: SOCIAL THEORY AND SOCIAL STRUCTURE, pp. 131-94.

goals are more important than the means to achieve those goals. Merton gives the example of sports and games, the way they are sometimes played in U. S. A. Winning the match is more important than the spirit of the game.

In India this theory is reflected in one very important area of contemporary concern, namely, the use of unfair means in examinations by some students. It is very clear that those who employ such questionable means are not much concerned with the amount of labour needed to distinguish themselves in the examinations but would like to secure success leading to degrees, the only thing which they think is relevant for evaluating their academic worth and achievement. Not only are unfair means used or attempted to be used but quite often it results in violence against invigilators and destruction of property. The behaviour of the elders in the family, neighbourhood and educational institutions and real or imaginary belief that everyone is corrupt in public life make things more difficult. It is argued that it is not the real worth of a person but the pulls and pressures, which one can exert, which will determine one's status in society. Consequently everyone feels justified in seeking shortcuts to academic achievements, employment and ultimately to success in life.

The position obtaining in the contemporary Indian society does not appear to be an absolute misfit in the "scale of anomie" developed by Leo Srole. The scale comprises of five items related to an individual's perception of his social environment and his perception of his own place within that environment.¹¹ They are as follows :

1. The perception that community leaders are indifferent to one's needs.
2. The perception that little can be accomplished in the society which is seen as basically unpredictable and lacking order.
3. The perception that life's goals are receding rather than being realized.
4. A sense of futility.
5. The conviction that one cannot count on personal associates for social and psychological support.

11. Quoted by Merton in "CONTINUITIES IN THE THEORY OF SOCIAL STRUCTURE AND ANOMIE" ; "SOCIAL THEORIES AND SOCIAL STRUCTURE".

Theories of Juvenile Gang Delinquency

Though poverty and lower-class status do not necessarily lead to delinquency, their influence can directly lead to formation of juvenile gangs. A gang is obviously more dangerous, because the potential value of doing harm of a number of persons acting for a common goal together is higher than their capacity to do mischief individually. The likelihood of formation of such gangs is higher in areas populated largely by lower-class persons compared to neighbourhoods of mixed or predominantly middle-class socio-economic status. Fredrick M. Thrasher in one of the earlier studies on juvenile delinquency focussed attention on the groups to which the delinquents belonged.¹² According to him the delinquent must be dealt with as a member of all the various groups to which he belongs—the family, neighbourhood, school, religion, occupational group, and so on, as well as his gang. Thrasher found more than 1,300 gangs in Chicago and its environs. He reported that the gangs were typically found in what he called “the poverty belt”. The characteristics of the ‘poverty belt’, according to his study, were deteriorating neighbourhoods, shifting populations and high mobility. Group delinquency, according to Thrasher, develops in slums out of the acts committed by the gang members to derive excitement from the adventure involved in the acts.

Albert K. Cohen discerned some sort of peculiar culture among the gang delinquents which he termed as ‘delinquent sub-culture’.¹³ According to Cohen, a delinquent sub-culture may be defined as “a way of life that has somehow become traditional among certain groups in American society”. These groups are the boys’ gangs that flourish most conspicuously in the “delinquency neighbourhoods of our larger American cities”.¹⁴ The reason why such a culture is developed is given by Cohen by saying that the members of the gang share a number of problems and the sub-culture is a response to find out the solution to the problems. The shared problems of the gang flow from their low status in the community and the expectations from them of the

12. Frederick M. Thrasher: *THE GANG*, 2nd Revised Ed., University of Chicago Press, 1960.

13. *DELINQUENT BOYS* (The Free Press, New York, 1955).

14. *Ibid.*, pp. 25-30.

typically middle-class behaviour like ambition, individual responsibility, talent, asceticism, rationality, courtesy, and control of physical aggression. Such a situation, according to Cohen, creates a problem for the lower-class boys since they do not have the advantage of the same socialising process as the middle-class boys whose conduct is regarded as the standard conduct.

Regarding the characteristics of the delinquent sub-culture Cohen is of the view that it is non-utilitarian, malicious and negativistic. It is non-utilitarian since the delinquent acts are sometimes committed "for the heck of it" and not because of any gains occurring to them and the culture is malicious and negativistic in the sense that they enjoy committing the delinquent acts not because of any comfort derived for themselves but from the discomfort they have caused to others and find cause for pride in reputations they have acquired for "meanness".¹⁵

John Kitsuse and David Dietrick have pointed out many flaws while evaluating Cohen's theory of sub-culture.¹⁶ They don't agree that the boys of lower class families care very much about what middle class people think of them. Nor do they agree that the delinquent acts are always non-utilitarian or malicious towards respectable persons. They also point out that the theory does not explain clearly as to how the sub-cultures are sustained after being developed once. While trying to answer this question, Kitsuse and Dietrick put an alternative formulation. According to them, the original motives of the gang members are not the same for participating in delinquent activities but later on they develop one thing in common with each other which maintains the sub-culture. The common bond is that they reject their rejectors *i.e.* the respectable persons and those responsible for correctional programmes for the young who develop hostile reaction to the deeds of the gang members. It has also been argued that it is the economic injustice and not the middle class expectation problem that leads young persons to gang culture.

15. *Delinquent Boys: A Critique*, American Sociological Review, XXIV (April 1959), pp. 208-15.

16. Richard A. Cloward and Floyd E. Ohlin: *DELINQUENCY AND OPPORTUNITY*, as quoted in 'DELINQUENT BEHAVIOUR' by Don C. Gibbons, p. 119.

It is our view that many discontented lower class youth do not wish to adopt a middle class group. The solution they seek entails the acquisition of higher position in terms of lower class rather than middle class criteria.¹⁷

Cloward and Ohlin draw attention to the fact that access to deviant behaviour differs in case of children belonging to different classes. In other words, whether a child shall have access to deviant behaviour or not depends upon differential opportunity. The difference between Merton's "means-end" theory and the theory of "differential opportunity" is that the former emphasises differences in access to legitimate means according to position in the social structure, while the latter considers the possibility of unequal opportunities for illegitimate means which is often referred to as "Chicago tradition".

Multiple Factor Approach

Social Institutions and Crime Causation

Delinquent and criminal behaviour is shaped within the various institutions of society. In other words one who ultimately turns out to be a delinquent or criminal person is the product of the different socio-economic institutions of which he happens to be a member. Therefore some understanding of the social institutions and their impact on human behaviour is imperative.

Family and Crime Causation

The first and most important social institution which determines the individual's behaviour towards society in general subsequently is the family of the individual. The family not only gives him the first social contact in the world i.e. with other members of the family, but also determines his position vis-a-vis the larger world. The perception of environment by the child, and his attitudes towards it are, therefore, greatly influenced by the family. According to psychologists, the formation of basic personality of a child is complete in the first ten or twelve years of his life and it is obvious that the family's impact in this period is almost exclusive.

Lack of affection, either actual or as perceived by the child, is regarded as an important contributory factor in anti-social attitude. It is because the child is dependent on its parents for its physical as well as social needs. The lack of affection may arise

due to different reasons, like disharmonious relationship between the parents, broken home *e.g.* when one or both parents are missing due to death, divorce or desertion.

One study, which brought out the element of parental rejection as a contributory factor in delinquency, was made by Ruth Topping in the New York State Training School. The personality characteristic of the aggressive delinquents included an acute desire for acceptance and affection, aggressive speech flavoured with threats to kill people, and a sense of having a hard life and being faced with unequal odds.¹⁷ Another study of 500 children in a Michigan child guidance clinic revealed that many of the aggressive ones in the sample had experienced psychological rejection by their parents. The aggressive attitudes can be attributed to the inadequate socializing influence due to lack of affection.

Lack of affection can result from broken homes and many studies have established the obvious relationship between this factor and delinquent behaviour. The process may not however be as simple as it appears on the face of it. The reporting of delinquent behaviour of children from broken homes to the police and the follow-up action by the police and correctional service officers may be greater in magnitude as compared to corresponding reporting and action in case of delinquents from unbroken families.

Sometimes there may be lack of affection, or its perception by the child, even in families which cannot be termed as broken families like the ones where the parents, due to some reason or the other, have no time for their children. It may be because of too much involvement in their occupations on the part of the parents but quite often owing to too much preoccupation with so-called social activities. The latter phenomenon is particularly discernible among the upper strata of the society in big cities, both in India and abroad. The institution of working mothers is also coming up fast in the middle class educated families which has its own strong and weak points, and an endless debate goes on as to whether married women should confine themselves to their home and children or should they have distinct personalities in terms of professional career and employment. The problem is obviously not

17. Don C. Gibbons : *DELINQUENT BEHAVIOUR*, 1970.

simple and involves consideration of factors of multidimensional nature. In this connection it may be said that despite the various arguments against the joint family system in India, there is at least one good aspect of it; parents are not the only source of socialization in the family, and lack of affection, if any, is therefore compensated through other relations, particularly grandparents.

Formal Education and Delinquency

After family, it is the school which provides the most important opportunity to a child for the development of his social attitudes. Apart from other factors, the prime reason is that the child spends a very substantial part of his total time in a day at school.

The school may be responsible for the development of delinquency in certain ways or it may be that certain problems come to the surface only after the child's entry into the school. Truancy or running away from school may either be due to certain factors operating within the school structure or due to certain factors already unfavourable to the child which are precipitated due to interaction of factors connected with the school. In any case, truancy may be the first step towards criminal behaviour. Factors such as low socioeconomic status of the family, low intelligence, lack of motivation and related poor school performance, emotional instability and personality defects, ineffective adjustment of instruction and subjects to pupil's needs, lack of participation in extracurricular activities, disinterest in subjects, unsympathetic attitude of parents to education, feeling of not "belonging" in the classroom are important factors affecting the attitudes towards school even in a highly advanced country like the U. S. A. Certainly some of these factors operate with much more severity in a country like India where most of the government and municipal schools are poorly equipped and education is imparted without creating any motivation for the children of the lower class families which form a substantial part of the population. For most of the parents of this class it is almost a luxury to send their children to schools, provision for free education upto a certain level notwithstanding. Mostly this is so because such parents need to supplement their meagre incomes through employing their children in whatever way possible.

There is a general feeling that schools are dominated by middle class values which create problems of adjustment for children coming from lower groups. Unconsciously, the teachers frequently react differently to children from different social classes. One reason could be that most of the school teachers come from typically middle class families. They detest conduct which is more common among lower class families, such as profanity, vulgarity in language, and physical aggressiveness. Stephen Abrahamson, an American scholar, goes even to the extent, on the basis of "overwhelming evidence", of saying that upper middle class and lower middle class pupils receive much more than their share of high grades in the school tests.

Economic Factors and Crime

The importance of economic factors in the causation of crime and of economic crimes in general can be pointed out by quoting Hermann Mannheim. According to him, if traffic offences are omitted, the administration of criminal justice all over the world has to devote probably three-quarters of its time and energy to "economic crimes".¹⁸ There cannot be any doubt that poverty contributes a great deal, both directly and indirectly, to the commission of delinquent and criminal acts. But it is equally obvious that poverty alone cannot be made accountable for all the economic crimes committed. It hardly requires any research to say that there are many people who manage to keep themselves honest and upright even in the most trying circumstances while there may be others who after earning millions would like to earn another million by employing dishonest means. This aspect has been discussed later in the chapter on white collar crimes.

Bonger's Theory of Economic Structure and Crime

The most notable and stimulating contribution to criminology in understanding the relation of crime and economic structure has been made by William Aldrian Bongor (1876-1940) who sought to explain the phenomenon of crime on the basis of the Marxist approach. Born in a religious Dutch family, he developed an antagonism to religion as a reaction to the stuffy atmosphere at home. Without denying the influence of hereditary traits in

18. CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION, 1958, p. 82.

human behaviour, he emphasised the importance of environmental factors not only in the case of criminals but also in great men. It was due to him that criminology became a separate field of science in Holland. Through his classic book, AN INTRODUCTION TO CRIMINOLOGY, and his doctorate thesis, CRIMINALITY AND ECONOMIC CONDITIONS, Bonger had great influence on American and English minds. Bonger insisted that the criminal was a product of the capitalistic system which, instead of promoting altruistic tendencies among members of the society, created selfish tendencies. The system based on 'capitalistic exchange' is motivated by profit element. In such a system each member tries to get the maximum from others in return of the minimum from himself. This attitude of the capitalist, according to Bonger, affects the attitudes of the proletariat as well. *lowest class of society*

The oppressed resort to means which they would otherwise scorn.....the basis of social feeling is reciprocity. As soon as this is trodden underfoot by the ruling class, the social sentiments of the oppressed become weak towards them.

Bonger identifies many evils in the capitalist system which are conducive to the spread of criminal behaviour. Child labour according to Bonger is entirely a capitalistic phenomenon which is one of the salient features of juvenile delinquency. Long hours of work by workers have a brutalizing effect on them. Finally, illiteracy among people of lower classes contributes greatly to the commission of crimes.

The theory propounded by Bonger no doubt gives one very important basis of the causes of criminality. He, however ignores the tangle of inter-relationships among social, cultural, economic, political, religious and other sets of factors. According to his theory, the phenomenon of crime should have come to an end or at least controlled to a very great extent in socialist countries like the U. S. S. R., which is not at all the factual position. According to the study made by the Cavans, juvenile lawbreaking has become frequent in all the strata of the Soviet society.¹⁹

There is no doubt, however, that poverty does play an important role in delinquency and the capitalistic system may

19. Cavan and Cavan : DELINQUENCY AND CRIME, pp. 104-131.

Areas of punishment

Chapter IV

REACTION TO CRIME—PUNITIVE APPROACH

Reactions to crime have been different at different stages of human civilization and even at a given time they have been different in various societies. It has rightly been said that the attitude towards crime and criminals at a given time in a society represents the basic values of that society. The attitude towards criminals has always been coloured by the extreme type of emotions displayed by the society. In the words of Elmer Hubert Johnson, he (criminal) may be described as a monster or he may be pictured as a hunted animal or as the helpless victim of brutality.¹ As a result of the changing attitudes, three types of reactions can be discerned in various societies. First is the traditional reaction, of a universal nature which can be termed as the punitive approach. It regards the criminal as a basically bad and dangerous sort of person and the object under this approach is to inflict punishment on the offender in order to protect the society from his onslaughts. The second approach, of relatively recent origin, considers the criminal as a victim of circumstances and a product of various factors within the criminal and society. This approach, since it regards the criminal as a sick person requiring treatment, is termed as therapeutic approach. Finally there is the preventive approach which instead of focussing attention on particular offenders, seeks to eliminate those conditions which are responsible for crime causation. It should, however, be understood that the three approaches are not mutually exclusive. Not only do they overlap with each other, sometimes they may coexist as parts of the overall system in a society.

1. CRIME, CORRECTION AND SOCIETY, p. 3.

Punitive approach has its focus of attention, as observed earlier, on the damage caused to the victim and danger posed to the society. The criminal is treated as something incapable of being reformed. He is judged on the basis of his past conduct and not on what improvements he is capable of in the future. This approach even today remains a potent force though not many will justify it in the same way as was done earlier and now some rationalizations are made to suggest that the therapeutic ideal is also covered by this approach.

Rationalizations of Punitive Reaction

An interesting question may be raised at this point. How can the urge in people to punish the offenders be explained? Various answers have been given to explain the human psychology involved in this context. Donald R. Crassey tried to answer it on the basis of his "scapegoat hypothesis". The criminal is made a scapegoat to give relief or gratification to the members of the community. This relief or gratification is due to their sense of freedom from their own guilty feelings about the crime, as a result of punishment given to the offender. This is based on the theory that all human beings have criminal propensities though in most cases they may not be reflected in actual behaviour. If no outlet to such feelings is provided by punishment, even lynching may be resorted to by the people. According to another view, the hostile reaction to the criminal works as a bond between the non-criminal members of the community. The bond represents the reassertion of moral principles common to the members of the society and serves as a reminder of the taboos to all of them.

Whatever may be the real impulses in the human mind responsible for the infliction of punishment on the wrongdoer the rational explanations advanced are quite a few and a brief examination of some of them follows.

The rationalizations of punishment may be divided into two classes, based on retributive and utilitarian theories while the retributionists assert that the infliction of punishment is justified in itself since offenders should be given their deserts, the utilitarians regard punishment as an evil which should be used only if it serves some real purpose like deterrence from commission of crime.

Retribution Theory

Retribution has been regarded as a very important feature in the punitive scheme. It aims at restoring the social balance disturbed by the offender. The offender should receive as much pain and suffering as inflicted by him on his victim to assuage the angry sentiments of the victim and the community. Sir James Stephen claimed that criminal law stands to the passion of revenge in much the same relation as marriage to sexual appetite.² Various theories have sought to justify the retributive aspect of punishment in theological, aesthetic and expiatory grounds. Retaliation fulfils a religious mission of punishing the offender, it re-establishes the social harmony affected by the offence and the offender's guilt is washed away through suffering.³

The most forceful presentation of the case for retribution is the justification for punishment, by the eighteenth century German philosopher Immanuel Kant. He expressed his opposition to the utilitarian concepts in the following words :

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime, for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the law of things.⁴

Emphasising the supremacy of legal justice, Kant observed :

The law concerning punishment is a categorical imperative and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it in keeping with the Pharisaic motto : 'It is better that one man should die, than that the whole people should perish : If legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth.'⁵

2. Stephen : GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND, p. 99.
3. Heinrich Oppenheimer : THE RATIONALE OF PUNISHMENT (1913).
4. THE METAPHYSICAL ELEMENTS OF JUSTICE, translated by John Ladd (Bobbs Merrill, U. S. A) p. 100.
5. Ibid., p. 100.

The extreme limits to which the retribution element must be carried, is expressed thus :

Even if a civil society were to dissolve itself by common agreement of all of its members (for example, if the people inhabiting an island decide to separate and disperse themselves around the world) the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the blood guilt thereof will not be fixed on people because they failed to insist on carrying out the punishment, for if they fail to do that, they may be regarded as accomplices in this public violation of legal justice.⁶

These postulates of retributivism have been criticised. It has been asked, for instance, that if individuals have no moral right to exact retribution, how can a group of individuals in the society, acquire such a moral right. As regards expiation, Blackstone urged that atonement and expiation should be left to the Supreme Being.⁷ There is some merit, at least theoretical, in the expiation argument that the offender gets an opportunity of making a new start after the 'atonement'. The practical snag is that it becomes extremely difficult for a person to start with a clean slate after being convicted of an offence. The chances of his being admitted to society as a normal human being are certainly affected after undergoing punishment. In a very interesting comment on retribution, Nigel Walker observes :

If...the retributionist is arguing that punishment is justified in spiritual improvement, he is asking that the penal system should do the work of the Church. He is certainly entitled to ask that it should not make the work of Church impossible (for example, by placing obstacles in the way of contact between offender and the priest). But if he asks that it should adjust the nature of the penalty to assist in the work of the Church he is raising awkward questions. For example, would this justify longer (or shorter) prison sentences, for Christians than for atheists? But I do not think that genuine retributionists regard retribution as a means in this way. For them it is an end in itself.⁸

The theories of punishment based on retribution have also been sought to be defended on the ground that punishment reflects

6. *Ibid.*, p. 102.

7. Blackstone : COMMENTARIES IV, p. 11.

8. SENTENCING IN A RATIONAL SOCIETY, p. 13.

denunciation of the criminal and his act by the society. In his evidence to the Royal Commission on Capital Punishment, 1949-53, Lord Denning observed:

The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime.

In the opinion of Prof. H. L. A. Hart such an approach tends to invert the priorities since punishment should not be for the sake of denunciation alone but a deserved punishment does serve as denunciation. According to him, we do not live in society in order to condemn though we may condemn in order to live.⁹

It follows, therefore, that the concept of denunciation belongs to the utilitarian rather than the retributive theories.

It appears from the above discussion that retribution theory in its purest form, which provides that the penal system should be designed to ensure that offenders atone by suffering for their offences and their suffering should be of the same magnitude as that of their victims, has lost much of its ground in the context of modern and more enlightened views on the functional value of penal law.

Utilitarian Theory

As mentioned earlier, the utilitarians view punishment as a means to achieve certain ends with the aid of criminal law. Punishment must serve as an instrument for reducing the crimes either by deterring the offender and others from doing similar acts in future or it should prevent the commission of offences by incapacitating the offenders. Reformation of the offenders through punishment is also sought to be achieved, though the efficacy of punitive approach in the reformation of the offender is extremely doubtful.

Deterrent Theory

One of the utilitarian rationalizations which is advanced to justify punitive reaction is that punishment acts as a deterrent to the offender punished and also to others in the community.

9. PUNISHMENT AND RESPONSIBILITY, p. 182.

It is assumed that as in day to day life the infliction of pain or its apprehension keeps people away from certain proscribed behaviour, the same purpose is served by punishment in relation to conduct forbidden by law. It has been suggested that the so called deterrent approach is a veiled form of the retributive spirit. There seems to be no answer to the question as to whether punishment really deters the offender in future or other members in the community. Obviously it will be a difficult task, almost next to impossible, to establish in a clearcut manner as to who has been deterred, and on what occasions, by the apprehension of infliction of punishment. As a result, the statistical evidence for the effectiveness (or the lack of it) of deterrents is scarce and of limited applicability. An interesting study to test the deterrent effect of penal sanctions was made by Professor Schwartz and Miss Sonya Orleans with reference to income tax laws. Nearly 400 taxpayers were divided into four matched groups. Members of the 'sanction' group were interviewed, and asked questions designed to remind them indirectly of the penalties which they might suffer if they tried to evade taxes. Members of the 'conscience' group were interviewed, and asked questions designed to arouse their civic sense and feeling of duty. The third, or 'placebo' group were asked only neutral questions, which avoided both sort of stimulus. The fourth group were not interviewed at all. The interviews took place in the month before the taxpayers were due to file their returns for 1962. The Internal Revenue Service compared the returns of the four groups for the year before the experiment and the year 1962. The reported gross incomes of both the 'sanction' and the 'conscience' groups showed an increase, compared with small decreases in the 'placebo' and uninter-viewed groups. The study, therefore, showed that the element of deterrence did have some effect in changing the attitude towards taxation laws.¹⁰

That punishment has some deterrent effect on many people, can be accepted without much debate.¹¹ But there are some

10. Schwartz and Orleans (1967), quoted by Nigel Walker in 'SENTENCING IN A RATIONAL SOCIETY', p. 59.

11. The results achieved by the Income-Tax Department under the voluntary disclosure scheme of 1975 in the wake of the national emergency serve as an impressive illustration. According to the press reports undisclosed assets worth about one hundred and fifty million rupees have been unearthed.

other deeper aspects which cannot probably be asserted with the same amount of confidence. The study made by Schwartz and Orleans may explain the role of sanctions in offences like tax violations but the situation may be more complex in a different type of offence like murder, where even the extreme threat of death penalty has not been proved to have much deterrent effect in many studies. The problem in fact is quite complex and one element which may really change the attitude one way or the other is not the threat of punishment as such but the belief regarding the chances of application of penal law. In other words, effective enforcement of penal law is a more important dimension than the mere presence of provision for punishment on the statute book. By the year 1800 over two hundred offences, it has been estimated, were punishable by death in England.¹² The reason was that the police was not so well-organised as it is now and the uncertainty of detection of crime and conviction of offenders was sought to be compensated through the provision for extremely severe punishment. An 18th century judge, while awarding one death sentence to a person guilty of stealing a sheep, observed 'you are to be hanged not because you have stolen a sheep but in order that others may not steal sheep'.

Efficacy of deterrent aspect of punishment can be pointed out with reference to the Islamic law of crimes as applied in Saudi Arabia, the only country where the system with all its severity is being applied even now. Muslim law of crimes, like other laws of medieval ages, is very severe in its application to offenders. For instance, mutilation of limb is possible as punishment in a case of theft. It is reported that crimes are almost unknown in Saudi Arabia and it is a common sight in towns where people leave their shops open and unattended even while they are away from them for some time. It may be pointed out, however, that several other factors might be operating for creating such a situation, like economic security and religious injunctions. Further it may be observed that deterrence is not the only purpose of criminal law but it has to maintain some other values as well.

Incapacitation

The punitive reaction is justified on the ground of incapacitation which results to the offender due to punishment. It is

12. Radzinowicz : A HISTORY OF ENGLISH CRIMINAL LAW FROM 1750, Vol. 1, p. 3

believed that the danger to the society is removed by placing the offender under imprisonment for a certain period which may be very long in case of persons with greater potential for mischief. It is obvious that such a rationalization takes a very dim view of the personality of the offender and his disablement to commit any offence for a duration of time is taken as an end in itself. It is only in recent times that the idea of possible reformation of the offender has found a place in the scheme of incarceration.

KINDS OF PUNITIVE APPROACHES

Various forms of punishments have been evolved and applied in different societies through the ages. Tortures, sadistic forms of executing death sentences and all sorts of cruelties in the prisons were some of the distinguishing features of the penal philosophy all over the world till relatively recent times.

The punishments provided in many parts of the world, including India¹³ are death, imprisonment for life, rigorous and simple imprisonment, forfeiture of property and fine. A discussion of the problems involved in them may be useful at this point.

Corporal Punishment

Before the rise of humanitarianism in the penal philosophy, mutilation, branding and flogging were well recognized modes of punishment. In India, the corporal punishment of whipping which was first added and regulated by the Whipping Act of 1864 (repealed and replaced by the Whipping Act of 1909), was abolished in 1955. In England, flogging has been abolished quite some time ago. Yet, if this type of punishment is itself a dead letter, the issue whether or not to reintroduce it is very much a living one, and as recently as 1960 the Advisory Council on the Treatment of Offenders was asked to consider the desirability of such a course.¹⁴ In the U. S. A., Delaware is the only State still using the whipping post while the State of Maryland has reserved it for wife-beaters only.

To prove the efficacy of whipping, it is argued frequently by some people that flogging by parents or schoolteachers in childhood

13. Section 53, Indian Penal Code.

14. P. J. Fitzgerald: *CRIMINAL LAW AND PUNISHMENT*, Clarendon Law Series (1962), p. 228.

have a constructive effect. Such an argument ignores two aspects of whipping as a correctional measure. Firstly, the whipping administered by a parent or even a teacher is in the context of the emotional relationship between the child and the pain-inflicting source. That certainly is lacking in case of a person doing it on behalf of the police, jail or some other authority. Secondly, the whipping done by a parent or schoolteacher inflicts pain generally within a very short time after the delinquent act is committed by the child and such promptness in the punishment is bound to heighten the effect of the chastisement.

Various studies made in the U. S. A. and England do not seem to support the view that whipping has any particular deterrent effect. In a research carried out by the British Home Office, the subsequent criminal records of 440 persons sentenced for robbery with violence in the 1921-1930 period were compared with 142 sentenced to corporal punishment. Of those flogged, 55 per cent were subsequently convicted of a serious crime compared to 43.9 per cent of those not flogged.¹⁵ Elmer Hubert Johnson sounds a note of caution before any conclusions can be drawn because the sentencing court may have considered personal characteristics of the convicted offender before deciding whom to whip.¹⁶ It may be observed that even if the punishment of whipping is used, it is not likely to have much effect on hardened criminals like robbers (as shown in the above study) but it may cause some deterrence to wifebeaters and eveteasers.

Fines

Fines as an additional or alternative form of punishment have been increasingly favoured by the law as well as judicial authorities.¹⁷ They are singularly more appropriate in offences relating to traffic, employment of persons unauthorised by law, violation of laws regarding manufacture and distribution of goods. They are very frequently imposed in relation to property crimes like embezzlement, fraud, theft, violations of lottery and gambling laws and minor offences like loitering and disorderly conduct. In

15. Quoted in Gordon Rose: *THE STRUGGLE FOR PENAL REFORM* (1961).

16. *CRIME, CORRECTION AND SOCIETY*, p. 404.

17. For a detailed discussion of punishment of fine, see Chapter VIII dealing with sentencing process.

the Indian Penal Code the provision for fines, as punishment, was justified by its framers thus :

Fine is the most common punishment in every part of the world and it is a punishment the advantages of which are so great and obvious that we propose to authorise the courts to inflict it in every case.....Imprisonment, transportation, banishment, solitude, compelled labour are not equally disagreeable to all men. With fine the case is different. In imposing a fine it is always necessary to have regard to the pecuniary circumstances of the offender, as to the character and magnitude of the offence. The mulct which is ruinous to the labourer is easily borne by a tradesman and is absolutely unfelt by a rich zemindar.¹⁸

The framers of the Indian Penal Code were Benthamites and it is not surprising, therefore, that the above observation is an echo of what Bentham had said regarding the utility of fines. According to him the punishment of fine had the advantage of being capable of regulation according to the means of the offender, implied no disgrace and was remissible in case of unjust convictions as discovered subsequently. The disadvantages according to Bentham are that the family and dependants of the offender are hit and the punishment is not exemplary, as in its execution no spectacle is made.

The imposition of fines may be made in four different ways as provided in the Penal Code. It is the sole punishment for certain offences and the limit of maximum fine has been laid down; in certain offences it is an alternative punishment but the amount is limited; in offences where it is imperative to impose fine in addition to some other punishment; and in offences where it is obligatory to impose fine but no particular pecuniary limit is laid down.

As regards the question of quantum of fines, no general provision exists in England to regulate it. But both Magna Carta and the Bill of Rights contain provisions prohibiting excessive and unreasonable fines and assessment. In India, the framers of the Penal Code observed that in offences, which are the result of

18. Note A, Reprint, p. 97, quoted by R. C. Nigam : *LAW OF CRIMES IN INDIA*.

greed, the amount of fines ought to be so excessive as to reduce the offender to poverty.¹⁹

There must be some power vested under the law to realise the fine imposed upon the offender. In many cases the courts award imprisonment in default of fine. This power to courts has been given under Section 64 of the Penal Code. Legally speaking, the position is that the fine pronounced in a judgment becomes a debt in favour of the State or Crown in England. An interesting question arose in England as to whether such a debt was personal to the offender so that it was extinguished by his death or it was capable of being recovered from his estate after his death. It was held that the debt was not extinguished by the death and was accordingly recoverable from his estate in the suit filed by the Crown.²⁰

Forfeiture and Confiscation of Property

Forfeiture of property which is the subject-matter of the offence is a possible mode of punishment under the Indian Penal Code in certain circumstances.²¹ But forfeiture of the whole of the property of the criminal is not possible according to the present law. Such a punishment was possible under the original Penal Code but the provisions were repealed in 1921. Recently the Law Commission invited opinions on the basis of a questionnaire relating to the question of introduction of some forms of punishment in the Code. One of the items in the questionnaire was regarding the confiscation of the entire property of the criminal. The opinions received by the Commission were largely against the introduction of confiscation as a punishment in the Code. The Commission too was of the view that "this harsh punishment, which will fall not only on the criminal but on his dependant family is not to be commended"²². It may be observed here that the Commission does not appear to have applied its mind to the problem in depth. Simply saying that the family and dependants would be affected is probably not enough. Such a punishment is certainly called for in cases of smugglers^{22a} and blackmarketeers

19. See Note A, Reprint, p. 97 of the Commission's Report.

20. *H. M. Treasury v. Harris*, (1957) 2 All ER 455.

21. Sections 125, 126, 127 and 169 of the Code.

22. Law Commission of India, Forty-Second Report (I. P. C.) p. 58.

22a. Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (13 of 1976).

where prima facie the source of income or property acquired by the offender may be illegal. As regards hardships to the family, the same is caused in varying degrees by all forms of punishment. When a killer is sentenced to death or life imprisonment, hardship is inevitable to his family if he happens to be the sole or the most important breadwinner for the family. In a country, which claims to be a welfare State, the family, if hit hard, must be provided financial relief by the government agencies and the family's possible suffering need not be used as an argument for withholding a punishment from an offender who deserves it otherwise. The punishment has been retained in the Indian Penal Code Bill of 1972.²³

Banishment

This punishment is one of the most ancient ones. The object is to eliminate the criminals from the society by sending them to far-off places and sometimes even rebels, revolutionaries and reformers were also taken care of by this process. In India, transportation meant the despatch of more dangerous criminals to '*Kala Pani*' i.e. to Andaman and Nicobar islands. The draftsmen of the Indian Penal Code, while proposing this punishment, took note of the extraordinary fear among Indians of the sea, particularly those living far away from it and felt that the punishment caused more terror in the Indian minds than what was actually warranted by the actual punishment. It was, therefore, thought to have it in the Penal Code because of its peculiar deterrent value. As observed by Sir Hari Singh Gaur, it had an additional dimension for Hindus because going beyond the seas involved the forfeiture of one's caste.²⁴

The practice of sentencing by transportation to Andman islands came to a halt in the early forties during the occupation of the islands by the Japanese. Finally, by an amending Act of 1955 the punishment was abolished altogether and transportation for life or a shorter duration was substituted by imprisonment for life or shorter period as the case may be. In England also, transportation as a punishment was abolished in 1854. This type of punishment is possible

23. Clause 19(vi).

24. PENAL LAW OF INDIA, Vol. I, 1972 Edition, p. 380.

in the U.S.S.R. where it is known as exile, which means the removal of the convicted person from the place of his residence, with obligatory settlement in a certain locality, usually Siberia, where living conditions are extremely bad due to the freezing cold. Recently, the question of introduction of this form of punishment was considered by the Law Commission of India which concluded :

The suggestion did not find favour in any quarter. From the practical point of view, it almost necessarily involves the establishment of a penal settlement in each State, somewhat similar to the settlement in the Andaman Islands..... The running of such settlements and keeping effective control over the convicts banished thereto will give rise to difficult problems of administration. If the control were to be strict, the settlement would degenerate into concentration camps. As an alternative to long-term imprisonment, banishment does not appear to have any appreciable advantage, and cannot be recommended.

Imprisonment

Imprisonment in its pure and simple form is a kind of punitive reaction, its object being primarily to deprive the offender of his liberty which is the most serious damage which can be caused to a human being, next only to deprivation of life by death sentence. In recent times, the correctional idea has also been brought in to introduce some changes in prison philosophy but even now, imprisonment remains the most common mode reflecting punitive approach and its fundamental character remains the same.

Imprisonment as a form of punishment is of relatively recent origin and got prominence as a result of the decreasing use of the capital punishment and transportation in most of the countries during the last century or so. The traditional concept of prisons was different from the one in which it has been understood since the middle of the last century.

Traditionally it was held that imprisonment should be used only for the custody of offenders until such time as they could conveniently be dealt with, and this view prevailed in Europe from the time of the Roman Emperor Justinian for the next thousand years or so. In medieval England prisons were places where suspects were detained until the royal judges came round on circuit with a commission of 'gaol

delivery', to empty the jails and inquire into the alleged crimes.²⁵

The most serious problem associated with imprisonment is what has been termed as 'prisonisation'.²⁶ The prisoner, introduced to a new environment which has its own culture and values is affected by the direct impact on the earlier culture which the prisoner was exposed to before entering the jail resulting in 'aculturation' of the offender. His personal identity is the first casualty in the process. From a human being bearing personal characteristics, he is converted into a mere impersonal entity in the new subordinate social group. His name is replaced by a number. His clothes, food and working and leisure hours are just the same as those of other members of the group i. e. the fellow prisoners. In other words he is a unit to be processed by the prison employees and to quote Alfred Hassler, the prisoner is perceived as a job, rather than as a person.²⁷ All this results in some sort of social debasement of the convict in his own eyes.

Equally damaging is the effect on family relationships. Many legal systems even recognise imprisonment as a ground of divorce available to the spouse of the convict. The only possible contact with the family members is through periodic visits permitted to them under the jail rules. These contacts by their very nature are bound to be after sufficiently long periods of time and that too, for a short duration under the claustrophobic atmosphere created by the carefully laid down rules. It has been suggested by some reformers of the prison system that prisoners should be allowed to continue their family life within the prison but the practicability of such a proposal has also been questioned. It is only in certain prison systems in Europe and South America, that arrangements are made for 'connubial visits' between the spouses.

Instead of moving the criminal away from criminal tendencies, imprisonment sometimes results in something just the opposite. Gambling and deviant sexual behaviour, in the form of homosexuality, are some of the offences for which the prison provides

25. P. J. Fitzgerald : CRIMINAL LAW AND PUNISHMENT, p. 233.

26. Donald Clemmer : IMPRISONMENT AS A SOURCE OF CRIMINALITY, 1950.

27. DIARY OF A SELF-MADE CONVICT, (1954) Chicago.

the ideal breeding ground. In case the employees of the prison happen to be corrupt, the prisoner comes to know the efficacy of bribe as a means to gain some minor favours from them.

Finally, the most serious thing which happens to the prisoner is the stigma arising out of a prison term. He cannot be kept in prison for all time to come and sooner or later he has to go back to the society from which he came to the jail. The difficulties which he faces in getting accepted once again in society are obvious and need not be overemphasised. Prisoners often feel, quite justifiably, that the real punishment begins after they leave the prison.

May be that all the defects in the imprisonment process, as discussed above, are capable of being used as very good arguments to highlight the deterrent and retributive elements of the punitive reaction. They are however certainly incompatible with any rehabilitative ideals which some reformers might be contemplating in the prison system.

Capital Punishment

Capital punishment is one of those subjects of human concern which give rise to an endless debate without producing any conclusions which can be scientifically tested to make them convincing to both the parties to the debate. To abolish or not to abolish is the problem which has been faced in many countries and is being faced in others even now.

The crusade against capital punishment started in England and Europe as a result of the works of utilitarians like Bentham and Beccaria who insisted that punishment being an evil in itself should be just sufficient to curb the menace of the crime and no excessive punishment, including capital punishment, ought to be inflicted where some lesser penalty could achieve the same result. The humanitarian movement resulted first in the reduction of number of offences punishable with death which was about 200 by the end of the 18th century, and then in the ultimate abolition of capital punishment for all offences except that of treason. In the U. S. A. criminal law being a State subject, the position differs from State to State. Some of the States have abolished capital punishment while some have retained it. Very recently the question of constitutionality of death sentence

was raised before the American Supreme Court which held that the capital punishment provision was violative of the Eighth Amendment of the Constitution in the sense that the punishment was of 'unusual and cruel' nature.²⁸ In India too, the problem has been engaging government and public attention over the years but is still there on the statute book though its use has been sparingly made and there is a tendency to restrict its use to grave offences committed under aggravating circumstances.^{28a}

To understand the points for and against the abolition of capital punishment we have to examine the justification of death sentence and also see whether any alternative measure would have the same effect.

The question whether capital punishment has the necessary deterrent quality or not dominates the debate regarding the efficacy of capital punishment. The advocates of retention of capital punishment hold that punishments have the deterrent effect in general and logically speaking, capital punishment should have the maximum deterrent effect. Their contention based on the argument that abolition of capital punishment would unleash criminals now restrained by their fear of the executioner. The abolitionists, on the other hand, are not so sure of the deterrent effects of death sentence. By way of illustration, an episode is recalled: once the pocket of a police constable was picked by someone in a crowd watching the public execution of a person found guilty of pickpocketing in England. Various studies have been made in the U. S. A. where crime rates have been compared within a State on the basis of statistics before and after the abolition of death penalty and also between States which had abolished it and which had not done so. It is claimed on the

28. But the Indian Supreme Court has held it constitutional. See *infra* p. 62.

28a. The capital punishment is confined by the code only to six principal offences, namely:

- (i) Treason *e.g.* waging war against the Government of India (S. 121); abetment of mutiny (S. 132);
- (ii) Perjury resulting in conviction and death of an innocent person (S. 194);
- (iii) Murder (Ss. 302 and 303);
- (iv) Abetment of suicide of a minor or insane person (S. 305);
- (v) Attempted murder by a life convict (S. 307, cl. 2); and
- (vi) Dacoity with murder (S. 396).

basis of such studies that no increase in murders and other serious crimes took place as a result of abolition. This contention ignores two aspects of the question. Firstly, that the reliability of statistics remains untested. Secondly, there are many factors of socio-economic nature which determine the quantum of crime committed in a society. For instance, the economic and employment situation in the two States, which are compared, may be different or it may be different even in the same State before and after the abolition. The relative efficiency of police may likewise be different. In the words of Dean Francis Allen :

But the fallibility of such statistical inquiries is obvious, and it is important here to be aware of what we do not know. In the first place, most of these studies require accurate statistics on the number of capital offences actually committed. This presupposes a system of crime reporting that is both accurate and in a form which makes the information accessible. The fact is that, particularly in the United States, these conditions do not obtain. But even if such basic data were at hand, other difficulties would emerge. Suppose, for example, it is shown that in State X murder rates declined in ten year period after abolition. Having learned this, what do we know? Simply that abolition did not prevent a decline. Whether there is a causal connection between the two occurrences, whether the crime rates would have been the same, higher, or lower, had the death penalty been retained, are questions that quite clearly remain unanswered. Comparisons of jurisdictions that have and have not abolished capital punishment are afflicted by similar infirmities.²⁹

Regarding the deterrent aspect of the capital punishment, Edward J. Allen gives a convincing argument by raising a pertinent question :

If this be true, then why do criminals, even the braggadocian Chessman type, fear it most? Why does every criminal sentenced to death seek commutation to life imprisonment?

Probably it can be argued here that the point involved is actually of the certainty of death sentence after the same has been awarded which is necessarily not the case when the offender who committed the criminal act might have been sceptical about the penal consequences of his act. Many serious offences like murder or rape are committed under momentary impulses where the

29. Francis Allen : *BORDERLAND OF CRIMINAL JUSTICE* (1964), p. 98.

reasoning of the offender gets too clouded to be effective in terms of appreciating the penal consequences.

The crux of the matter is that the numbers of those who are found guilty of capital offences do prove that capital punishment has failed to deter but it is impossible to find out as to in how many cases it actually deterred the potential offenders. As the Royal Commission on Capital Punishment of England remarked: "We can number its failures. But we cannot number its successes."

Next, it is argued that capital punishment brutalizes human nature. It may be countered by saying that just the opposite is true. Brutality, like many other concepts, is to be understood in a particular context. It is a relative concept, not an absolute one. Capital punishment is a reaction against certain types of brutalities committed by some of the human beings. So, far from brutalizing the human nature, it seeks to remind people to get rid of their brutal tendencies and there is no evidence to suggest that it does not succeed in this mission.

One popular argument in the armoury of abolitionists is that the death sentence is irrevocable and there have been some instances of innocent persons being hanged.³⁰ Another argument is that it is the poor people who run greater risk of capital punishment and rich persons are always able to avoid it with the help of their wealth. There is some substance in both these arguments but on careful scrutiny, it is clear that they point out defects in the administration of justice and not anything against capital punishment as such.

It is said, and there is some force in it, that the courts are sometimes reluctant to find a person guilty of a capital offence due to the severity of the punishment involved, and thus legal interpretation is accordingly strained. This has sometimes some bearing even on the constitutional rights of the accused. In one case, for example, Mr. Justice Harlan said that 'due process' requirement in case of an offender, facing trial with possible punishment of imprisonment or fine, might not be adequate for an accused being tried for a capital offence.³¹ And for a number

30. The heavy burden of proof on the prosecution minimises such a dangerous risk to a very great extent.

31. *Reid v. Covert*, (1957) 354 US 1, 77.

of years the constitutional law of right to counsel explicitly distinguished capital cases from those involving other penalties, even life imprisonment.³²

The abolitionists emphasise the rigidity of the punishment in cases of mental abnormality of the offender where he is not found legally insane. Even before the abolition of the capital punishment in England, the doctrine of diminished responsibility for such offenders was incorporated in the Homicide Act of 1957. In the U. S. A., the Durham rule has removed the harshness of criminal law in case of mentally abnormal offenders who do not have such a high degree of unsoundness of mind as to qualify as legally insane under the old McNaghten's rules. In India, though the test of insanity in criminal law is based on the rigid principles of McNaghten's case,³³ death sentence is generally not awarded in case of an offender not being legally insane but mentally insane otherwise.³⁴

Sometimes a popular argument advanced by the abolitionists, due to the lack of appreciation of the legal position on their part, is that many murders are committed in the heat of the moment without premeditation on the part of the offender. For many such killings death penalty is either not possible or is not awarded. 'Grave and sudden' provocation and killing in the heat of passion are treated as culpable homicides if falling within exceptions one and four of Section 300 of the Penal Code and the maximum penalty permissible is life sentence. Otherwise also, judges have discretion not to give death sentence in a case of murder and give lesser sentence of life in the presence of some extenuating circumstances. It may be pointed out in this connection that under Section 367(5) of the Criminal Procedure Code, as it stood before the 1955 amendment, the normal rule was to sentence the accused to death on a conviction for murder and to impose the lesser sentence of imprisonment for life for reasons to be recorded in writing. That provision was deleted in 1955 and now under the Criminal Procedure Code of 1973 the court has to give reasons for awarding capital punishment.³⁵

32. *Bute v. Illinois*, (1948) 333 US 640; *Powell v. Alabama*, 287 US 45.

33. S. 84 of the Indian Penal Code.

34. *Queen Empress v. Kadar Naryer Shah*, 23 Cal 604; *Emperor v. Gedka Goala*, AIR 1937 Pat 363.

35. See Chapter VIII for sentencing in capital cases.

Capital Punishment Controversy in India

The debate regarding the retention of the death sentence has been going on for quite some time now. A bill was introduced in the Lok Sabha in 1956 which was rejected by the House. Efforts were also made in the Rajya Sabha to move the resolution for the abolition of capital punishment in 1958 and in 1962 but they were withdrawn each time after some debate in the House.

The Law Commission in its 35th report concluded that the risks involved in the abolition of capital punishment could not be undertaken in the present state of the country.³⁶ They summed up their impressions as follows :

The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind. It is difficult to rule out the validity of or the strength behind many of the arguments for abolition. Nor does the Commission treat lightly the argument based on irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment and the strong feelings shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the abolition of capital punishment. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area in this context. Similarly even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts. On a consideration of all the issues involved, the Commission is of the opinion that capital punishment should be retained in the present state of the country.

In *Jagmohan Singh v. State of U. P.*³⁷, the constitutional validity of capital punishment was challenged before the Supreme Court. It was argued that the 'right to live' was basic to the freedoms

36. Thirty-fifth Report, Law Commission, Govt. of India, p. 354.

37. (1973) 1 SCC 20: 1973 SCC (Cri) 169.

guaranteed under Article 19 of the Constitution. The Supreme Court rejected the contention and held that capital punishment cannot be regarded as unreasonable *per se* or not in the public interest and hence could not be said to be violative of Article 19 of the Constitution

To sum up, it may be observed that the present position regarding capital punishment is quite a balanced one. The framers of the Penal Code had recommended sparing use of it and, as evident from the discussion above, it has not been employed in this country with a vengeance. To have it on the statute book but to use it rarely seems to be the best compromise between the extreme attitudes of the retentionists and abolitionists of the capital punishment not only in India, in view of the conditions pointed out by the Law Commission, but also in many other countries.

Apart from the conventional punishments on which attention was focussed in the preceding discussion, there are some other possible modes of dealing with offenders. Some of them were considered by the Law Commission while reviewing the contents of the Penal Code and it made recommendations which are given below.³⁸

Externment from a locality

The rationale of this punishment is that dissociation of the offender from his surroundings may reduce his capacity to commit crimes of some particular nature. The Commission did not favour such a punishment due to the possibility of its repercussions on the offender, his family and the likely exploitation of externment by the politically motivated violators. This form of punishment has, however, been accepted in the Indian Penal Code (Amendment) Bill of 1972.³⁹

Corrective Labour

This form of punishment is not a type of punitive reaction in the strict sense since the emphasis is on the reformation and rehabilitation of the offender. This mode provides an opportunity to the offender for working at his own residence or some work

38. Forty-second Report, 1971, pp. 44-81.

39. See Clause 19

centre outside the prison. It is a common mode of punishment in the U. S. S. R., Lenin's teachings providing a basis for the approach. The Commission felt that the Russian scheme could be put to good use with some modifications in the Indian set-up. Some of their recommendations were as follows :

1. The essence of the punishment will be working on reduced wages at a public work centre.
2. The punishment of corrective labour will be primarily suitable for persons belonging to the labouring classes.
3. Offences punishable with death, imprisonment for life or imprisonment for a term exceeding 7 years should be excluded from this punishment.
4. Deductions from the wages of the person sentenced to corrective labour will be made at a rate laid down by the judgment of the court and credited to the State. The rate may be between 5% and 20% of the wages.

Compensation for Injury by the Offender

Ordinarily, criminal law is not concerned with the problem of compensation to the victim of a crime. For this the victim may seek remedy in the law of torts through a civil court. But sometimes compensation is payable by an offender to the victim as a part of the punishment awarded to him. Compensation to a victim may be made in three different ways. The State may be made responsible for the payment of compensation, or the offender can be sentenced to pay a fine by way of punishment for the offence and, out of that fine, compensation can be awarded to the victim, or the court trying the offender can in addition to punishing him according to law, direct him to pay compensation to the victim of the crime, or otherwise make amends by repairing the damage done by the offence. The Commission noted that the pattern existing in some European countries like France and Germany was not suitable for India and neither did they see any great advantage in the Russian model. The Commission favoured a substantive provision in the Penal Code for payment of compensation out of the fine imposed on the offender. In this connection the Commission was of the view that Section 545 of the Criminal Procedure Code, 1898 was quite a comprehensive provision

which was not fully utilised by the courts and, therefore, inclusion of a substantive provision in the Penal Code was recommended by the Commission. The Indian Penal Code (Amendment) Bill of 1972 provides for this kind of sanction.⁴⁰

Public Censure in certain Anti-Social Offences

This punishment is based on the premise that the offenders of the upper strata of society indulging in crimes characteristic of that strata, may be punished more effectively by bringing their deeds to public notice through effective publicity. The Commission noted that such a form of punishment was already in vogue in countries like the U. S. S. R. and British Columbia. In India, the rationale of the punishment is manifested in its limited application in certain provisions of the Prevention of Food Adulteration Act, 1954⁴¹ and the Income Tax Act, 1961.⁴² The Commission recommended the insertion of a new provision in the Penal Code for such a punishment in the event of a second conviction of a person for offences relating to currency and stamps, weights and measures, food and drug adulteration, extortion, criminal misappropriation, breach of trust and cheating and offences relating to documents. This form of punishment has also been incorporated in the Bill of 1972.⁴³

Evaluation of Punitive Reaction

The discussion relating to the various punishments makes their defects and shortcomings quite evident and it is certain that the trend from punitive to therapeutic attitude shall remain on the increase all over the world for quite some time to come. But as the next few chapters will lead us to believe, even the therapeutic approaches are not altogether free from difficulties and criticisms. May be that the society will find it fairly difficult, at any stage of civilization, to get rid of the utility of punishment in the absolute sense and hence punitive philosophy, in some form or the other and in varying degrees of importance, shall continue to be relevant to the penological thought. While concluding the discussion on punitive reaction, it is worthwhile to restate the significance of the

40. Clause 19 (v).

41. Section 16(2).

42. Section 287.

43. Clause 19 (viii).

punitive philosophy in the words of Stephen, a great advocate of the use of punishment in the interest of society.⁴⁴

The sentence of the law is to the moral sentiment of the public in relation to any offence is what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment. The mere general suspicion or knowledge that a man has done something dishonest may never be brought to a point, and the disapprobation excited by it may in time pass away, but the fact that he has been convicted and punished as a thief stamps a mark upon him for life. In short, the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it ... This close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I think it highly desirable that criminals should be hated, that the punishment inflicted upon them should be so contrived as to give expression to that hatred.... No doubt they (punishments) are peculiarly liable to abuse, and in some states of society are commonly in excess of what is desirable, and so require restraint rather than excitement, but unqualified denunciations of them are as ill-judged as unqualified denunciations of sexual passion. The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other.

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44. A HISTORY OF THE CRIMINAL LAW OF ENGLAND, (1883) pp. 81-82.

Chapter V

THE THERAPEUTIC APPROACH—PRISON REFORM

The therapeutic approach, as noted earlier, is of recent growth even in countries where great progress has been made in science, education, business and industry. In countries like India, the approach so far has been somewhat in the rudimentary form. Before the British rule in India, the Muslim law of crimes was applied in the country which, like other medieval systems, was severe in its attitude towards criminals and treated them as incorrigible without having the slightest prospect of reformation. Though the Britishers introduced a criminal law system which was milder compared to Muslim law of crimes in terms of punishments, the basic attitude towards the criminal remained the same *i. e.* punitive. It was only in the later part of the British rule and during the last three decades after independence that there has been a change in the attitudes towards criminals, the change from punitive to therapeutic or corrective approach.

Whatever has happened in India in the field of correctional approach is the direct outcome of developments taking place in the penological thought of various countries, particularly in England and the U. S. A. It will, therefore, be useful to know about the evolution of the therapeutic ideal in England and other western countries.

It was only around the twelfth century that administration of justice was taken over by the Crown in England. Before that like other tetric tribes in North-Western Europe, crime was regarded as a wrong against person for which compensation was payable by the wrongdoer to the victim. This is the reason for holding that the ancient law of crimes was not really the law of crimes but the law of torts. Subsequent to the Crown taking over the administration of criminal justice, the compensation was

to be paid not to the victim but to the Crown. In course of time, this became an important source of revenue. Imprisonment, as understood then, was not an end in itself by way of punishment. It was used to compel the offender to pay the fine, or to spend the period between arrest and trial or between the conviction for a capital offence and its execution. Torture, mutilation of limbs and outlawry were the common modes of punishment in the early days. Capital punishment had not become as common a punishment as it was by the end of the eighteenth century. Cellars, gate-houses and towers, which were used to serve as detention houses were kept in extremely inhuman conditions. Criminals, guilty of serious as well as of petty offences, debtors and the insane persons were all put together in those detention houses. There was no separate arrangement for men and women. These gaols were not maintained by the State and private parties conducted them on commercial lines. Inmates were charged for the accommodation, even for the chains used on their bodies and of course for supplying meals, liquor and women. In the words of Lionel W. Fox, the gaols were dens of lechery, debauchery, moral corruption, and pestilence.¹

In the meantime another development took place which further checked the significance of imprisonment as a mode of punishment and any possibility of serious thinking about the problems inside the jails was adversely affected. This was the rise of capital punishment in England and increasing use of transportation to the newly discovered colonies of North America. Leon Radzinowicz has given a detailed account of the factors responsible for the greater use of capital punishment and also the figures regarding the increase in the number of capital offences.² Among the reasons which he advances was the fact that many Englishmen were not convinced that imprisonment and transportation were as deterrent as capital punishment. Another reason was that the property-owning class, which dominated the English public life, naturally had large stakes in having death sentence in many offences against property. All this resulted in

1. THE ENGLISH PRISON AND BORSTAL SYSTEM (1952).

2. Leon Radzinowicz : A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, Vol. 1.

the increase of capital crimes from fifty in 1688 to about two hundred by the end of the eighteenth century.

The punishment of transportation which was commonly used was also criticised. It was described by Lord Ellenborough as "a summer's excursion" to "a happier and better climate". Even this "summer's excursion" was difficult to continue after England lost its American colonies and consequently the 'unsettled' continent of Australia was the only choice available to the Government for sending the criminal away. The lack in faith in transportation as a good deterrent and the difficulties experienced in executing the punishment contributed a great deal in the spectacular rise of capital punishment.

The period which saw the rise in the cruelties in the criminal law and its administration, also witnessed the birth and growth of the 'enlightenment' era in England and Europe which ultimately paved the way for the more humane approach towards the criminals. The 'enlightenment' stood for the original worth and dignity of all human beings since the movement insisted on rational method of thinking in all sciences including the ones dealing with social behaviour. The rationalist philosophers believed in the natural rights of human beings and did not concede the right to take away any one of those rights to the State. Prominent among these philosophers of enlightenment were John Locke (1632-1704), David Hume (1711-1756), Jeremy Bentham (1748-1832), Voltaire (1694-1728) and Charles L. de S. Montesquieu (1689-1775). A reference to the contributions of Voltaire and Jeremy Bentham to the reformation of criminal law has already been made in the earlier chapters. Montesquieu was more concerned with improving the behaviour of people rather than the punishment. He was of the view that moderate punishments would result in better administration of justice and the punishments must not be out of proportion to the offence the guilty person is punished for.

These ideas had great appeal to the middle class people. This middle class was the outcome of socio-economic changes brought about by the Industrial Revolution and was influenced by the humanitarian philosophy of the enlightenment. The humanitarianism in the middle class can be attributed to several factors. Many members of this class had risen from the lower strata and

it was easier for them to be moved by the sufferings of children, the poor, the disabled, lunatics, defectives and prisoners. In other words their concern for criminals was a part of the general feeling for the underdog. In this way a process of reformation of the criminal law system was initiated which resulted not only in the improvement of prison system but also found expression in probation, parole, juvenile courts and other institutions and crime prevention. It is also argued by some believers in economic determinism that it was not so much the element of humanitarianism which impelled the middle class to act for reformation but their own selfish interests based on cheap labour which was adversely affected sometimes by many persons of lower strata being confined in jails or sentenced to death.³ Whatever may be the real motives, the crux of the matter is that these ideas had a profound effect not only in England and Europe but also in many other countries.

British Prison Reforms

Since penal reforms are mostly reflected in prison reform during the last two centuries or so, the study of therapeutic approach can be taken up beginning with prison reforms. We have seen the emergence of the humanitarian movement around the end of the eighteenth century which was directed towards the problem of better administration of justice and the issue of capital punishment in general with the gradual reduction in the number of capital offences and the transportation of convicts falling in disuse, imprisonment as a mode of punishment was bound to gain more eminence. John Howard may be rightly called the pioneer in the prison reform movement in England. He believed in the reformation of personal character as the goal of imprisonment and sought to translate his ideas into practice when appointed High Sheriff of Bedfordshire in the year 1773 and continued the good work upto the time of his death in 1790. For the first time he tried to do something about the bad sanitary conditions prevailing in prisons and made separate arrangements for prisoners of different sex. He recognised the importance of religious and moral instruction and the utility of learning trades and crafts in

3. George Ruche and Otto Kirchheimer: **PUNISHMENT AND SOCIAL STRUCTURE** (1939), Columbia University Press, New York.

the prison. Today these elements are considered a must in any prison. At the same time Romilly was trying to effect new trends through his efforts in Parliament. Shortly afterwards, England got some of its first prisons constructed. Greater progress, in the meantime, had been made in the prison philosophy in the United States where two rival methods known as Pennsylvania and Auburn systems were pursued. The question in England was whether to follow the Pennsylvania or Auburn system. Some familiarity with the two systems therefore, becomes necessary at this point.

Pennsylvania System

The Quakers established this system in the last years of the eighteenth century and the beginning of the nineteenth century, Philadelphia's Walnut Street Jail giving them the opportunity to experiment with solitary confinement. In the beginning only hardened criminals of more serious offences were given solitary confinement. Others were kept in big rooms, eight to ten together, and were given work like carpentry *etc.* for which they were paid wages. Later on it was felt that solitary confinement was an effective means of regeneration as the person left to himself would have better opportunity of reflection and would be saved from the contaminating influence of the fellow prisoners. As a result, the inmates were kept in complete seclusion all through the sentence. Denial of work was the rule and offer to work an exception. Emphasis was on exposure to religious sermons. Two French observers of the American prison system acknowledged the reformatory effects of absolute solitude in the following words with which many may not agree :

Generally, their (prisoners') hearts are found ready to open themselves and the facility of being moved renders them also fitter for reformation. They are particularly accessible to religious sentiments, and the remembrance of their family has an uncommon power over their minds....Nothing distracts, in Philadelphia, the mind of the convicts from their meditations, and as they are always isolated, the presence of a person who comes to converse with them is the greatest benefit....When we visited this penitentiary, one of the prisoners said to us : "It is with joy that I perceive the figures of the keepers, who visit my cell. This summer a cricket came into my yard, it looked like a companion. When a

butterfly or any other animal happens to enter my cell, I never do it any harm."

It is obvious that the French observers came to know only the brighter side of the story without even imagining the shattering effects which continuous solitary confinement might produce on the inmate. The disillusionment came at Auburn prison at New York when it was discovered that character reformation was not achieved by solitary confinement as evident from the return of many criminals to the prison. Many suffered in health and some even made attempts to commit suicide. A change in prison philosophy was, therefore, needed.

Auburn System

A kind of compromise was effected in this scheme as compared to the Pennsylvania system. The inmates were allowed to associate during daytime only in connection with hard work required for maximum production. They were to be kept separate from one another at night and visits from relations were allowed in exceptional circumstances. The prisoners were not allowed to speak to one another and strict discipline was maintained inside the jail.

For a long time a controversy went on in the U. S. A. regarding the relative merits and demerits of the two systems with the result that the States were divided on the issue. The Pentonville prison in England was one of the earliest constructed in England in 1842 which served as a model to many more constructed subsequently. It was the Pennsylvania system which was accepted at Pentonville.

Some significant changes occurred in the prison administration in the latter half of the nineteenth century. As a result of the abandonment of transportation as an alternative punishment, the problem of overcrowding in the prisons assumed serious dimensions and so from 1853 the system of 'ticket of leave' was resorted to for tackling the problem of overcrowding. Under this system the prisoners could be released before the completion of sentence on the condition that they would not indulge in crime and instead, find employment. In this practice the basis of the modern system of parole can be detected. Another important development was that the control of prisons was transferred to the national

government from the municipal authorities under the Prisons Act of 1877. Even upto this stage the new philosophy of correction and rehabilitation had not found firm roots, and the policy fluctuated between harsh and less harsh methods. This will be evident by the fate of what was called the Irish system.

The man who created the Irish system was Sir Walter Crofton, Chairman of the Board of Directors of Irish prisons. The system worked on a scheme in which the prisoners passed through three stages. At the first stage the prisoners were kept under strict discipline and given some schooling for an hour a day. All prisoners, except those who were 'violent' and 'idlers', were now transferred to another prison where labour opportunity on fortifications was provided and modest wages were also paid. Prisoners who were found 'violent' and 'idlers' were put in chains and given a low diet. The third stage sought to carry the process further and prepare the prisoners for release. The prisoners were sent to different prison units of small size. They were employed on land reclamation projects under ordinary labour conditions without any armed guards being posted around. Moral education was imparted and some efforts were also made to find jobs for the prisoners to be released under tickets of leave. Many current reformatory methods, it appears, involve the same techniques *i. e.* prison labour, open institutions and conditional release before the term of imprisonment.

The Irish system fizzled out subsequently due to strong public opinion in favour of deterrent punishments which gained further momentum due to the increase in the number of crimes in general and armed robberies in particular in Britain in 1862. The Royal Commission on Penal Servitude voiced the same sentiments favouring more severe punishments. The policy followed during that period was to achieve deterrence by "uniform discipline including silence, cellular labour, deprivation of all luxuries, absence of news from outside and the like"⁴.

Nothing happened by way of change in the English prison system till the year 1898 when the Prisons Act was passed which to this day remains the basic source of prison administration in

4. S. H. Smith : *PRISONS*, p. 63.

England. An important provision in the Act was to vest rule-making power in the Home Secretary who was empowered to make rules allowing remission of a part of the sentence of a convict on the basis of good conduct and hard work inside the prison. The Act was passed on the basis of recommendations of the Gladstone Committee which recommended that for the future, reformation and deterrence should be treated as "primary and concurrent objects", and the men and women coming to prisons should go out as better persons, physically and morally. The Committee also made special recommendations relating to discharged persons, professional criminals and young offenders.⁵

The present prison administration and philosophy in England is based on the following concepts:⁶

1. The sentence in prison should be utilised for moral, mental and vocational training.
2. The help of the community outside the prison should be made useful for such training.
3. The responsibility of the outside community should continue after the convict's discharge from the prison.

American Prison Reform

As noted earlier, the first significant development in the American prison reform was Pennsylvania system which was a model for prisons for about forty years. The reasons which led to another scheme, known as Auburn system, and its functioning have also been referred to earlier. Despite the difference between the two systems, there were many similarities too. In both the systems, the prisoners were not allowed to communicate with each other because of solitary confinement in one and the ban on communication in the other. In both there was a separation of prisoners at night, in Pennsylvania system the separation being round the clock. Both the systems recognised the importance of labour in the goal of imprisonment. But since the Auburn system was more economical to operate due to better industrial potential as a result of the prisoners working together, it was accepted by the

5. L. W. Fox: *THE MODERN ENGLISH PRISONS*.

6. For details, *PRISONS AND BORSTALS*, a Home Office publication, is a good source.

majority of the States and the Auburn system continues to provide the basic structure of prison administration in the U. S. A. Over the years many new ideas have modified the system as originally understood.

The reformation in the American prisons has not been even all over the country. It has been achieved at a higher level by the northern States particularly those on the east coast, as compared to the southern States. Some of the distinguishing features of American prisons shall be brought out while discussing the goals of prison sentences and the ways to achieve them.

Prison Reform in India

The prisons in India at the time of the takeover of the country by the East India Company were in a terrible condition. This was inevitable in a criminal justice system where deterrence was the only aim of a prison sentence. The situation, as seen earlier, was no better even in more developed and enlightened countries like England at that time. It is not surprising that the East India Company was not interested in investing any money in non-profit welfare programmes like improvement of the jails. It was ultimately left for Macaulay to initiate the task at a time when he was in the process of shaping the criminal law of India which eventually resulted in the Indian Penal Code. A committee was appointed by the Government in 1836 to give a report on the existing conditions in jails in the country and to suggest steps for future administration in the prisons. Understandably, the committee in their report ruled out the introduction of any reformatory ideas in the prison policy. This attitude was inevitable since even in England, at that time, there was a lot of scepticism regarding the possibility of reformation of criminals. The committee recommended the exclusion of

all reforming influences such as moral and religious teaching, education or any system of rewards for good conduct and suggested the building of central prisons where the convicts might be engaged not on manufactures which it condemned but in some dull, monotonous, wearisome and uninteresting work in which there shall be wanting even the enjoyment of knowing that a quicker release can be got by working harder for a time.⁷

7. Quoted in the Report of the Indian Jails Committee, 1919.

The only good thing which proved to be important, was that the problem of prisons was given more serious consideration from then onwards. Many committees were appointed and various Acts passed subsequently and some of the landmarks in the changes brought about by them may be taken note of here.

The Second Jail Committee of 1864 recommended a certain minimum space for each prisoner inside the prison, better clothing and food, and regular medical check-up of the prisoners.⁸

The recommendations made by the Third Jail Committee of 1877 proved quite unproductive but the reports of the committees appointed in 1889 and 1892 led to the passing of the Prisons Act of 1894. The penal policy as reflected through the Act continued to be far from reformatory and contemporary English thinking of deterrence was the basis of the Act.⁹

It was not before 1919 that a really progressive and modern approach was manifested by the Indian Jails Committee in its report to the Government. A clear departure from the earlier stands on deterrent aspect was made. For the first time, the principle of reformation of the convict was accepted. The Committee observed :

The Indian prison administration has lagged behind on the reformatory side of prison work. It has failed so far to regard the prisoner as an individual and has conceived of him rather as a unit in the jail administrative machinery. It has a little lost sight of the effect which humanizing and civilizing influences might have on the mind of the individual prisoner.¹⁰

The report discouraged the use of corporal punishment in jails. It suggested that labour in the prison should be productive but its main object should be to reform the offenders. The Committee also made valuable suggestions regarding education for the convicts and the after-care programmes for helping the ex-convicts

Immediately after independence the Government of India sought to achieve further reforms in the prisons. Dr. W. C.

8. Quoted in the Report of the Indian Jails Committee, 1919.

9. Vidya Bhushan : PRISON ADMINISTRATION IN INDIA, pp. 20, 21.

10. Report of the Indian Jails Committee, 1919, p. 32.

Reckless, an expert of the U. N. O. was invited in 1951 to make his recommendations. Later on, a committee was appointed to prepare an All India Jail Manual in 1957 on the basis of the recommendations of Dr. Reckless and the All India Conference of Inspectors General of Prisons. Some of the important recommendations, dealing with the reformatory and rehabilitative problems of the convicts, were as follows :

- (i) The correctional services should be integrated together under a Director or Commissioner under the control of the Home Department in each State.
- (ii) Greater use of probation system to avoid too much pressure on prisons.
- (iii) Creation of a Central Bureau of Correctional Services at the Centre.
- (iv) Establishment of State After Care Organisation in every State.
- (v) Abolition of solitary confinement as a mode of punishment.
- (vi) Classification of prisoners according to their needs in terms of personality.
- (vii) Periodic revision of the Jail Manuals in the States.

The administration of prisons being a State subject, the above recommendations are not of mandatory nature and only provide guidelines to achieve some uniformity in all the States. Most of the States have fallen in line with the recommendations.

Reforms relating to Young Offenders

The first and most significant move in this direction was the enactment of the Reformatory Schools Act of 1897, in the interest of children below the age of 15 years. The Act laid down :

Whenever any youthful offender is sentenced to transportation or imprisonment, and is, in the judgment of the court by which he is sentenced, a proper person to be an inmate of a Reformatory School, the court may... direct that, instead of undergoing his sentence, he shall be sent to such a school, and be there detained for a period which shall not be less than three or more than seven years.¹¹

Children's Acts have also been passed in relatively recent times by the various States and the centre as well. They lay down

11. Section 8, Reformatory Schools Act, 1897.

guidelines for juvenile courts and other institutions for delinquent and neglected children. ✓

Prison Objectives and Problems

If the objective of prison sentence, as evident from the discussion above, is not to have retribution against the offender but to make him a better human being so as to be more useful to the society, the question then arises as to how to achieve it. Obviously it is a stupendous task since it involves the reconciliation of two apparently conflicting forces. On the one hand there is the compulsive element of detention with all the evil consequences in terms of the social relationships and of the individual personality of the offender, as spelled out in the last chapter. On the other hand there are the efforts of the society to reform him. This clearly is a contradictory situation on the face of it and one need not be over-optimistic about the efficacy of various measures for correction and rehabilitation of the offenders. Even if it is assumed that reformation is possible, the response to the various measures will be different for different categories of offenders. Hardened criminals obviously do not have much likelihood of changing themselves. There may be, on the other extreme, convicts who might have committed even serious offences like murder in a highly exceptional situation and do not really need any reformation since they are not criminals in the true sense. Consider, for example, a typical Indian peasant, who as we know is quite hardworking, not at all dishonest, and very religious in his outlook. In a dispute relating to some agricultural land, a common phenomenon in rural India, caught in a highly emotional and exciting situation he may happen to cause someone's death in a weak moment through a thoughtless act. If he is found guilty of murder the least he can be given is a life term. What possible 'reformation' is going to take place in him? The prison labour, education and religious instruction are not needed by him. In a way it may be said that he is not being sent to jail for 'reformation' but to deter other potential killers in a similar situation. Then there may be difference in response of criminals to reformation owing to the age factor. Other factors being same in two offenders, the chances of an impact of the corrective measures on the younger one is bound to be more powerful as compared to the other. With these words of caution in

mind an analysis may be made of the techniques employed in correctional programmes and the difficulties involved therein.

Classification of Offenders

Individualization of treatment of offenders means that the personality of each offender is to be assessed and prison programmes are designed to meet the individual requirements as far as possible. For that, it is of utmost importance that offenders are classified. Classification of offenders involves consideration at two different stages. Firstly, at the time of determining which particular type of prison the offender is to be sent to and secondly, within a given prison the offenders are to be classified through medical, psychiatric, and psychological examinations; through educational and vocational studies, and through casework interviewing. As regards the classification of prisons, one way to do it is in terms of their security. Prisons with maximum security lay emphasis on efficiency in terms of guard force and other measures taken for risk-free custody and are used for dangerous and escape-prone convicts. On the other end are minimum security prisons where selected prisoners are kept on the basis of their trustworthiness. Between these two types, there are others known as close custody and medium custody prisons in the U. S. A. There are certain specialised institutions like those for women, first offenders and psychotics. The rationale for having different types of prisons on the basis of the convict being dangerous or otherwise, trustworthy or not, is based on the policy that a convict may be transferred to a better or more appropriate category depending upon his performance in jail.

For classifying the convicts in a given prison, it is necessary to have the details of their backgrounds for diagnosis. After the diagnosis is made, treatment is the next step. All this requires the cooperation of persons of diverse fields like social workers, doctors, psychiatrists and psychologists. In U. S. A. and some other advanced countries, the work of diagnosis and treatment of the offender is done by committees of these experts. In England exhaustive enquiries are made of the convict's family history, his past record and mental state and classification is done by a body of experts.¹²

12. L. W. Fox : *THE MODERN ENGLISH PRISON*, p. 76.

In India, prisoners are now classified on the basis of age, sex, mental health, nature of offence, whether a habitual or a casual prisoner. Casual prisons are sub-classified into (i) star, and (ii) general; and habituels into (i) non-professional, and (ii) professional. A casual prisoner is 'one who is first offender and who lapses into crime not because he has a criminal mentality but on account of his surroundings, physical disability or mental deficiency'. Casual prisoners whose previous character was good, antecedents not criminal and whose crime does not indicate grave cruelty and moral turpitude or depravity of mind, are classified into the 'star' sub-category. Other casual prisoners are placed in the 'general' sub-category.¹³

Non-professional habituels are those prisoners who lapse into crime owing to their surroundings, or some physical or mental defect, and who are not first offenders. In the other sub-category are included all other habitual prisoners, for instance, those who are men with an object, sound in mind and mostly sound in body, often highly skilled who deliberately and with their eyes open prefer a life of crime, and know the manoeuvres necessary for that life.¹⁴

Unlike U. S. A. and England, the classification work in India is not performed by committees of experts in the prisons. It is done by the court convicting the offender. The courts do not apply their mind in a given case and the whole process tends to be of a routine nature. According to Vidya Bhushan, the classification slip is filled up by a clerk of the court and the presiding officer of the court clears it as a routine.¹⁵ The undesirability of such a practice is obvious. Even if classification is not to be done by the committees, the least which can be done is that the judicial mind be applied to the question having regard to the various personal factors of the convict.

Prison Education and Religious Instructions

The tradition of imparting education to the prisoners in the U.S.A. goes back to 1876 with the establishment of Elmira Reformatory. In America it is done on the simple assumption that

13. U. P. Jail Manual, Rule 274 quoted in Vidya Bhushan: *PRISON ADMINISTRATION IN INDIA*, pp. 68, 69.

14. *Ibid.*, p. 69.

15. *Ibid.*, p. 69.

education and rehabilitation are directly connected in the sense that better education leads to better earning capacity and school is regarded as the cure of all evils. In India, due to mass illiteracy most of the prisoners do not have even elementary education. Only 33 per cent of the men convicts are literate. In case of women the percentage is only twelve.¹⁶ In such a situation, education is welcome even if it does not serve the rehabilitative ideal. In this connection, the observation of MacCormick is quite apt :

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If on no other grounds than a general resolve, to offer educational opportunities to under-educated persons wherever they may be found, is something worthwhile.¹⁷

According to him, the prison education should have the following components, so that individual needs of the prisoners may be fulfilled by some or any of them :

- (1) Fundamental academic education, designed to provide the intellectual tools, needed in study and training and in his everyday life.
- (2) Vocational education, designed to give training for an occupation.
- (3) Health education, designed to teach the fundamentals of personal and community health.
- (4) Cultural education, embracing the non-utilitarian fields which one enters for intellectual or aesthetic satisfaction alone.
- (5) Social education, to which all other types of education and all the activities of the institution should contribute.

The same view was expressed by the All India Jail Manual Committee: Diversified education is the principal channel of correctional treatment.¹⁸

Academic education gives a sense of achievement to the prisoner which goes a long way in exercising the corrective influences. In the Indian prisons, a big handicap is the lack of adequate

16. PROBATION AND PRISONS, A STATISTICAL ANALYSIS 1964-68, Central Bureau of Correctional Services.

17. A. H. MacCormick: THE EDUCATION OF ADULT PRISONERS, p. 34.

18. REPORT OF THE ALL INDIA JAIL MANUAL COMMITTEE, p. 46.

number of teachers. Sometimes the services of educated convicts are utilised, which has the obvious handicap that most of them do not possess either the training or aptitude for teaching. The only sound alternative is to have qualified teachers, if not on whole-time basis due to economic incapability, at least on part-time basis. It should not be very difficult to invite some members of the local community to help in a voluntary manner.

The importance of vocational education ^{پیشہ وارانہ تعلیم} cannot be over-emphasised. But the most important aspect to be kept in mind is the relevance of the vocational education to the sort of life which the convict would be exposed to after completing the sentence. In this connection, it may be pointed out that agricultural orientation is most suitable for a majority of the prison population in the Indian context. Forty-five per cent of the prisoners in India come with an agricultural background.¹⁹

Among the methods suggested by Glenn M. Kendall for social education, the most important is that the prison inmates may be given some measure of self-government and self-direction.²⁰ In the Indian conditions, panchayat system is an ideal approach to impart training in socialization. This system is being applied in many prisons in the various States in India.

Religious and Moral Education

The recognition of the importance of religious education in the American prisons is reflected in one of the principles of the American Correctional Association's "Declaration of Principles" which says :

Religion represents a rich resource in the moral and spiritual regeneration of mankind. Especially trained chaplains, religious instruction and counselling, together with adequate facilities for group worship of the inmates' own choice are essential elements in the programme of a correctional association.

The position of the chaplain was, however, quite established before the recognition came from the penologists. Even before the

19. PROBATION AND PRISONS, A STATISTICAL ANALYSIS 1944-68, Central Bureau of Correctional Services.

20. GENERAL AND SOCIAL EDUCATION IN CORRECTIONAL TREATMENT, 1946, pp. 105-17.

organized treatment of the prisoners, the chaplains showed keen interest in the prisoners and their families. In England too, religious instruction forms an important part of the treatment programmes. A chaplain is attached to every prison to carry out religious and moral education.

In India, rules in the jail manuals recognise the significance of religion and religious instruction for the reformation of prisoners of all the communities are offered facilities for their religious observances. Honorary teachers, selected by the district magistrates, deliver lectures on religious and moral subjects for an hour once a week.²¹ Vidya Bhushan is quite right in pointing out that the suggestion of the U. P. Jails Inquiry Committee, 1929, that maulvis and pandits be appointed in prisons on the line of the appointment of chaplains in England, was not suitable in the Indian context.²² Whatever might have been the position before independence when the committee gave its report, it is an absolutely outmoded approach in the secular set-up of post-independence era. It will be much better to confine the programmes to the teaching of general principles of morals and ethics without reference to any particular religion.) ✓

Prison Labour and Industry

The punitive approach used labour as a form of punishment. The emphasis was on hard unproductive labour and efforts were made to make it as unpleasant as possible. In the reformative approach it is to be used not as an end in itself but as a means to achieve certain skills in the prisoner which, apart from disciplining him, shall be helpful to him in finding some vocation to sustain himself after his release and he may also earn wages while serving in prison. In addition to these aspects, some prison administrators look at it from a utilitarian angle to justify it since it helps in the prison finances. The prisoner is in a position to contribute something for his maintenance in jail. There are many difficulties faced in organising industry in prisons. Though not evident any more, there was hostile reaction from organized free labour and some businessmen and industrialists when the movement of prison labour and industry was launched for the first time in the

21. Vidya Bhushan : PRISON ADMINISTRATION IN INDIA, p. 188.

22. *Ibid.*, p. 189.

U.S.A. In India, such a problem never cropped up but there were certain other problems which presented themselves in the Indian prisons, some of them being of universal nature.

It is found, for instance that many prisoners do not find any occupation to put to use any of the skills or trades learnt in prison. In one of the studies made in the U.S.A., it was found that two-thirds of reformed men did not use the trades they learnt in the institution and the rest who used their training were in the same trade before the imprisonment.²³ Not only may inmates be sometimes not interested in learning the trade due to lack of aptitude or its irrelevance after his release, even the prison administrators have been found lukewarm towards the programmes at other times. For instance the U. P. Industries Enquiry Committee also noted that training has never been taken by jail administrators seriously.²⁴

The payment of wages for the industrial work done by the prison inmates has also been criticised by those who are convinced of the need for the deterrent element of the jail sentence. It has been argued that punishment should involve the deprivation of the earning capacity of the offender. It is also pointed out that it is anomalous that while many law-abiding citizens find it difficult to find employment, work and wages are provided to a convicted person.^{24a}

After-care Programmes

Theoretically, the difficulties of a prisoner are over after his release since not only is his personal freedom recovered but his prison training makes him a fit person to start a new life on a clean slate. In practice, it is rarely the case. As the Central After-Care Association of England put it succinctly "many a prisoner approaches at the end of a long sentence in a state of bewilderment and fear as to what the future will hold for him"²⁵. This is evident in view of the stigma, loss of job, loss of family ties and alienation from friends which may directly flow from the imprisonment. The

23. Sheldon and Elener Glueck : 500 CRIMINAL CAREERS.

24. REPORT OF U. P. JAIL INDUSTRIES ENQUIRY COMMITTEE, p. 13.

24a. The criticism is levied in spite of the fact that the wages generally paid to the jail inmates do not compare favourably with the wages received by others for similar work.

25. ANNUAL REPORT, 1959.

Maxwell Committee on Discharged Prisoners Aid Societies described the plight of many persistent offenders thus :

Such offenders often have no home or family ties, or no such home or family ties as will supply the support and stimulus they need : no trustworthy friends ; no niche in society to buttress any legitimate self-esteem : there is merely a bewildered and frustrated malcontent floundering in a sort of social limbo between prison and a world with which he cannot come to terms ; a man not confirmed in criminality but with no strength or standards upon which to build a useful and honest life.²⁶

After-care has two connotations. In its narrower sense, it is somewhat like probation *i.e.* the released person is put under the care of a probation officer performing the role of a social worker. In its wider sense, after-care implies all efforts to enable the prisoner to overcome all the various social, economic and psychological problems after his release. Under the treatment philosophy, the after-care work, in a way, should commence as soon as the convict begins his prison life. In its very rudimentary form, it simply means that at the time of departure the prisoner is given some money by the State or his savings, made out of the wages earned in the prison, and a set of clothes to equip him for the 'new life'.

In India the after-care work was done for a very long time by philanthropic organizations which, in spite of some good work done by them, had all the limitations which such private organizations tend to have in this country. Various Jail Committees in their reports emphasised the need for having effective after-care programmes but hardly anything was achieved. The All India Jail Manual Committee, 1957 observed :

After-care is the released person's convalescence. It is the process which carries him from artificial and restricted environment of institutional custody to satisfactory citizenship, resettlement and to ultimate rehabilitation in the free community Institutional training, treatment and post-release assistance is a continuous process. After-care service, therefore, should form an integral part of correctional work.

At present, some good work is being done by a few public societies in various States. In U. P., one of the functions of the

26. Quoted in McClean and Wood : *CRIMINAL JUSTICE AND TREATMENT OF OFFENDERS*, p. 142.

Crime Prevention Society is to carry on after-care work through its district committees. The district committees not only provide money or clothing to the released prisoner but they also arrange for food and shelter to those in need of it. Efforts are also made to find employment for some of them. In a few cases even land has been managed for those who needed it. The other States where after-care work is being done in a relatively good manner are Tamil Nadu, Maharashtra and West Bengal, though work in some way or the other is being carried out in most of the States. It is obvious that the magnitude of the task yet to be performed is stupendous in a vast and developing country like India.

In England, the Central After-Care Association (Men's Division) is responsible for statutory supervision, primarily of prisoners serving sentences of imprisonment of four years and over, and sentences of corrective training and preventive detention. Under the Criminal Justice Act, 1961, supervision will be compulsory for prisoners under a sentence of four years and over and also for those serving sentences of imprisonment of six months or more who are recidivists or under twenty-six years of age at the date of sentence.²⁷ The association is completely financed by the State. An important recommendation of the Maxwell Committee for the guidance of aid societies was that aid societies should be more concerned with 'after-care' and less with 'aid on discharge' and that to assist in this process prison welfare officers should be appointed at local prisons to 'submit' to the appropriate aid society recommendations for the after-care of such prisoners as are willing and able to benefit from their services and appear suitable for special attention and assistance.²⁸

Two more developments in the prison system may be noted here which have some bearing on the question of after-care in England. One is the home-leave system and the other is the establishment of pre-discharge hostels. Home-leave may be granted to prisoners on corrective or long sentences. The leave is upto five days and gives an opportunity to the prisoner to contact those responsible for his after-care and also the potential employers. The pre-discharge hostels are meant for carefully selected men serving sentences of

27. J. P. Martin : *AFTER-CARE IN TRANSITION*, 1964.

28. *Ibid.*

preventive detention. The hostels are in the campus of the prison, the inmates go out to work in the local establishments and they have to pay for their upkeep out of the wages earned.

The need and philosophy of after-care programmes has been convincingly summed up by J. P. Martin in these words :

An effective penal system must aim for the re-integration of prisoners into society. In the last resort this is because there is a moral argument for after-care. It is simply that no man is so guilty, nor is society so blameless, that it is justified in condemning anyone to a lifetime of punishment, legal or social. Society must be protected but this is not done by refusing help to those who need it far more than most of their fellow citizens.²⁹

Prisons—Present position and future outlook

Prisons have come to occupy the central place in the administration of punishment all over the world. The prison system has come a long way since the jails were dens of lechery, debauchery, moral corruption, and pestilence where inmates were exposed to cruelties of the highest degrees while they waited for the ultimate punishment-death sentence or transportation.

The change can be gauged by noting radical developments, like the recent concept of part-time imprisonment in Belgium. In part-time imprisonment in that country the convicts continue to work or study in the community, their evenings and weekends being spent in prison. The Scandinavian countries had, of course, earlier established a system of weekend gaol sentences, particularly for those convicted of driving under the influence of alcohol.³⁰

In U. S. A. the above technique was employed much earlier under the Huber law in 1913. This was an adaptation of the open institution idea termed as "day parole" or "work release". This system stands between probation and imprisonment.

A redeeming feature of the prison administration which symbolizes the advent of a more progressive era in penological practices is the creation of open prisons. A beginning in the open prison system was made in U. P. in 1952 under the inspiration of

29. J. P. Martin : *AFTER-CARE IN TRANSITION*, 1964.

30. Nerval Morris : *PRISON IN EVOLUTION*, (1964).

Dr. Sampurnanand when a camp was opened at Chakia in Varanasi district. The inmates were allowed to work on their own or in local factories and were paid wages. At present 11 States have open prisons. Model prisons are the only institutions where some classification of convicts is done. The model prisons have been established for the well-behaved casual offenders. In the Lucknow Model Jail, farming occupies an important place in prison labour but the inmates have relatively much more freedom to act as they like without much compulsion on the part of prison administrators.

What is the future of prisons? It appears that the system of imprisonment is bound to continue in view of the gradual disappearance of some other modes of punishment, the most important of them being capital punishment. Hermann Mannheim seems to be too optimistic regarding the eventual demise of the prison as a means of punishment when he observes :

For centuries mankind had been accustomed to regard imprisonment as nothing but a preparatory stage for the infliction of other penalties. It is useful to remember this fact, because it may make it easier to many minds to reconcile themselves to the inevitable if imprisonment should again fall into disuse.³¹

Whether the disuse of imprisonment is 'inevitable' or not and what sanctions would replace imprisonment in case of its total disappearance are questions difficult to answer. But there is no doubt that imprisonment as a mode of punishment has already been affected adversely to a significant extent by other methods like probation, parole and work release.

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Nildora (Shopian)
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1988

31. *THE DILEMMA OF PENAL REFORM*, 1939, p. 45.

Chapter VI

THERAPEUTIC APPROACH—PROBATION AND PAROLE

Probation and parole emerged as techniques to mitigate the consequences of severe punishment when imprisonment became the more common mode of penal sanction in place of transportation and capital punishment. Probation came into existence to save some selected types of persons from the rigours of punishment even if found guilty by a court of law. Parole on the other hand developed due to a number of factors operating independently of each other. Before transportation as a mode of punishment came to an end, the convicts were sent to America and Australia from England and the job of transportation was assigned to the shipmaster or some contractor. After 1717 the British Government gave the contractor or shipmaster "property in the service" of the prisoner until expiration of his term. As the owner of the services of the convict for the period of transportation, the contractor or the shipmaster sold the services to the highest bidder on arrival in the colonies, and the criminal became an indentured servant under a contract. In the process the prisoner was released subject to certain conditions. This has some similarity with the parole practice as developed subsequently. Other factors which contributed to the growth of the technique were the English and Irish experiences with the ticket of leave system and the work of nineteenth-century American reformatories.¹

In England and the U. S. A. the source of probation can be traced to the binding over of a person for good behaviour or recognizance for appearance in the court when required.

1. Frederick A. Moran: "*The Origins of Parole*", National Probation Association Yearbook, 1941.

This was done with the cooperation of friends or other persons who voluntarily stood sureties for the person who would have otherwise been sent to prison. In Massachusetts in 1830 a woman was prosecuted for committing a theft in a house. She pleaded guilty but upon application of her friends, the court did not sentence her on the condition that the friends be responsible for her appearance when called by the court. In 1831 she was acquitted before the same court of another charge of larceny. Curiously enough she was sentenced on the basis of the earlier crime of larceny.² John Augustus, a bootmaker of Boston, is regarded in a way the pioneer of probation work in U.S.A. Member of a society to work against alcoholism, his shop was situated close to the police court in Boston. Once, while watching the court proceedings as a spectator, he asked the judge to permit him to be a surety for an offender who was to be given imprisonment. He continued providing bails to many offenders afterwards and was careful in selecting his cases on the basis of suitability for probation.)

The concept of probation may now be understood so that it may be distinguished from certain analogous techniques like parole. In England probation has not been defined anywhere in the statutes and the nearest thing to an official definition was provided by the Morrison Committee which observed that probation is the 'submission of an offender while at liberty to a specified period of supervision by a social caseworker who is an officer of the court'. It is apparent that in England probation order is not a sentence ; it was the implied consequence of, and is now the condition of, a type of binding over since probation originated in the form of voluntary assistance and guidance given to persons bound over to be of good behaviour.³ Probation order is made instead of sentencing and, therefore, cannot be regarded as conviction in general in future proceedings except when the offender prefers an appeal against the basis of the order itself pleading that he was wrongfully found guilty of the alleged offence. In England the law provides :

Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is

2. Frank W. Grinnel : "*The Common Law History of Probation*", *Journal of Criminal Law and Criminology* (May-June, 1941).
3. McClean and Wood : *CRIMINAL JUSTICE AND THE TREATMENT OF OFFENDERS*, p. 157.

fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years.⁴

The position under the Indian law will be evident from the following extracts of the relevant law :

When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion, that having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be "of good behaviour".⁵

It is further provided that when an order under sub-section (1) is made, the Court may, if it is of opinion that in the interests of the offender and of the public it is expedient to do so, in addition pass a supervisory order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.⁶

It follows, therefore, that the Indian law differs substantially from the corresponding English provision. Under English law in every case when an offender is to be released under probation, he is to be placed under a supervisor which is not necessarily the position in India. The court in India may not resort to Section 4 (3) and release the offender under Section 4 (1) of the Act under a bond with or without sureties and without any arrangement for supervision.

4. Criminal Justice Act, 1948, Section 3 (1).

5. Probation of Offenders Act, 1958. Section 4(1).

6. *Ibid.*, Section 4 (3).

Objects of Probation

The sole intention of the legislature in passing probation laws is to give persons of a particular type a chance of reformation which they would not get if sent to prisons. The type of persons who are in the contemplation of the legislature under the probation laws, are those who are not hardened or dangerous criminals but those who have committed offences under some momentary weakness of character or some tempting situation. By placing the offender on probation the court saves him from the stigma of jail life and also from the contaminating influence of hardened prison inmates. Probation also serves another purpose which is quite significant though of secondary importance. It helps in eliminating overcrowding in jails by keeping many offenders away under probation programmes.

Probation and Parole distinguished

Probation and parole have the same objectives—rehabilitation of offenders. In both the techniques, skilful supervision of selected offenders is involved outside the prisons. But there is an important distinction between the two. In probation the offender is not sent to jail after being found guilty and the decision to grant probation is to be made by the court. In parole the convict is released after serving his sentence for some time and the release is not the result of any judicial decision. *موقوفہ فی*

Probation and Suspended Sentence

There is a subtle difference between probation and suspended sentence. In suspended sentence a sentence of imprisonment or fine is pronounced but the execution of it is suspended for a period. The difference between a probationer and one under suspended sentence is that while the former does not know the exact punishment which would be inflicted upon him in case of violation of the terms of probation, the latter is fully aware of the nature and quantum of the punishment which could be enforced. Suspended sentence is used in Germany, France and some of the States in U. S. A. In France, for example, the use of suspended sentence is confined to offenders not previously imprisoned for crimes or delicts. Punishments like death sentence, banishment, loss of civic rights, or certain types of long-term imprisonment cannot be suspended. (The period of suspension is five years, and if during this period the offender is

not convicted of a further crime the conviction is wiped out, and the sentence lapses. If, on the other hand, he is so convicted, the sentence is automatically enforced.⁷

Some people have argued in England that suspended sentence is more effective than probation since probationers do not understand that they were liable to be punished for the original offence. But the Home Secretary's Advisory Council considered the proposition and concluded that the enforcement of suspended punishment might be inappropriate or unduly severe because of the difference in the circumstances of the offender at the time of the pronouncement of the sentence and its execution. Nor did the Council accept that probationers did not understand the sanctions underlying a probation order. They concluded that the Court's present powers to order probation or conditional discharge were able to achieve as much if not more, and that in European systems the suspended sentence was developing on lines resembling the English probation system.⁸

Selection of offenders for probation

Selection of suitable cases for being placed on probation and parole and the subsequent follow-up through competent supervision of the probationers and paroles are the two basic elements of any effective programme of probation or parole. The report of the probation officer is of primary importance as an aid to the court for making the decision regarding the release on probation. An ideal report should give information regarding family history and personal, social and economic factors of the offender and a plan for the correctional treatment of the offender if the recommendation is for the grant of probation. In short the probation officer has to evaluate the personality of the offender. The court has to make the decision after taking into consideration the probation officer's report and nature and circumstances of the offence.

The most important consideration is to appraise the risk involved to the society in releasing the offender and whether the risk is worth taking in the context of the offender's personality and the community at large. To some extent the job is done by the legislature by laying down that probation shall not be granted in some serious offences which are punishable with death or life imprisonment

7. Nigel Walker : CRIME AND PUNISHMENT IN BRITAIN, pp. 171-72.

8. *Ibid.*

ment. The legislature may also lay down some guiding principles in terms of the age of the offenders, making probation more desirable in case of younger offenders. For instance, the Probation of Offenders Act in India provides :

When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

Further, it is provided that the report of the probation officer shall be considered in order to conclude that probation order would be undesirable.⁹

Probation and Judicial Attitude

Within the area permitted by the legislature, the court shall have to exercise its discretion having regard to a number of factors. The judicial attitude can be appreciated with reference to some decided cases.^{9a}

In *Abdul Qayum v. State of Bihar*¹⁰, the appellant was only 16 years of age at the time of his conviction for the offence of the theft of Rs. 56 which he had committed by pickpocketing. He was given six months' rigorous imprisonment and a probation order was refused in spite of the fact that the probation officer had recommended it. The trial Court observed :

✓ In spite of his recommendation I do not feel inclined to extend the benefit of the provisions of the Probation of Offenders Act to accused Qayum. Apparently he is an associate of accused Shamim who is a hardened criminal and a person of doubtful character. Incidents of pickpocketing are very rampant in this sub-division and it was just a stray chance that accused Qayum was caught in this case. Having regard to these facts and the nature of offence and the circumstances in which accused Qayum was caught, he does not deserve the benefit of Section 4 of the Act. ✓

9. Probation of Offenders Act, 1958, Section 6.

9a. A few more cases on probation have been dealt with in Chapter X relating to sentencing process.

10. (1972) 1 SCC 103.

The appeal and the revision petition having been rejected by the Patna High Court, the appellant finally came to the Supreme Court which upheld the appeal and directed the trial Court to place him on probation on the grounds covered in the following observations :

..... there was no warrant for inferring that the appellant was his (Shamim's) associate. A reference to the report of the Probation Officer would show that the accused was physically and mentally normal. Though he was illiterate he had a vocational aptitude for tailoring and was working in the Bihar Tailoring Works. He was interested towards his work as a tailor and behaves properly with his father and brothers and has normal association with friends Both his father and his elder brother are employed. The attitude of the family towards the offender appellant was one of sympathy and affection and the father exercised reasonable control over him. The report of the neighbours is also in his favour . . . there is no report against the character of the offender, no previous conviction has been proved against him prior to this case and in the circumstances . . . the release on probation may be a suitable method to deal with him.

The extreme liberality shown by the Supreme Court in the case is obvious. Not only did the Supreme Court refuse to see that the offender was in fact an associate of Shamim, a seasoned pickpocket, but the Court also ignored two very pertinent observations made by the trial Court while refusing probation to the offender. Firstly, it was pointed out by the trial Judge that incidents of pickpocketing were very rampant in the sub-division and secondly, that it was just a stray chance that accused Qayum was caught in this case. These considerations were weighty enough to warrant a refusal for probation to the offender. The nature of the offence of pickpocketing is such that the first conviction does not ordinarily mean that it was really the first act of pickpocketing committed by the person. It is common knowledge that this type of offence requires an intensive training before the offender embarks on his criminal career and the chances of the offender being detected while on the job and his arrest are generally not very bright. In this context it is appropriate to quote what Professor Lotika Sarkar observed while criticising the provision for the unsupervised release of certain offenders under Section 3 of the

Probation of Offenders Act, the criticism being valid even for supervised probation in cases like the present one¹¹ :

In this context I would like to share with you the views of the Superintendent of Tihar Jail. Few years ago when we visited the place he regretted the fact that most pickpockets were let off the first time. He maintained that they were caught the first time but their modus operandi would make it clear that this was not the first time they were pickpocketing. Moreover most pickpockets, in his view, acted in little gangs and therefore this release had no effect either on him or his friends

Another case decided by the Orissa High Court¹² shows even much more latitude to young offenders, though in a more questionable way. In this case, the accused, a young boy of fifteen years, was found guilty of robbery under Section 394 of the Penal Code and sentenced to undergo rigorous imprisonment for one year. The boy had removed the jewellery from the body of a young girl after making her unconscious by inflicting grievous injuries to her. In this case it was held that probation could not be granted since the offence was punishable with life imprisonment. But strangely enough, after holding that the boy could not be released on probation, the High Court ordered his release by saying that the accused was a young boy of 15 years and a longer stay in the company of criminals will only turn him into a hardened criminal and the sentence was reduced to the period already undergone. It was ironical that by placing a restricted construction on the statute the court found probation inapplicable and then it let the boy loose, unsupervised, on the society. A better way of doing the same thing would have been to hold that since life imprisonment was not the only punishment laid down in the Penal Code for robbery, the boy could be released on probation, in which case at least the advantage of supervision would have been available. The Orissa High Court in interpreting the expression 'punishable with life imprisonment' with reference to Section 394 of the Penal Code took support from certain decisions of other High Courts in which probation was refused with the object of imprisoning those offenders, unlike the present case where the court not only refused probation but ordered the release of the offender as well.

11. PROBATION OF OFFENDERS ACT, 1958 : A RE-APPRAISAL, paper read in the Correctional Services Seminar held in Delhi University (1973).

12. *Jogi Nayak v. State*, AIR 1965 Ori 106.

The interpretation of Section 6 of the Act by the courts that probation cannot be given even if life imprisonment is only an alternative punishment prescribed for an offence, has given rise to great hardship to many young offenders in cases where they are found guilty of voluntary causing of grievous hurt punishable under Section 326, I. P. C. along with others on the basis of constructive liability under Sections 34 and 149 of the Penal Code.¹³

*Kalu v. State*¹⁴ brings out the point that such an interpretation defeats the very purpose of the section. The offender was a young man, less than 18 years of age, who was convicted under Section 326/34. Despite the fact that the judge appreciated that the offender was a "junior member acting merely under the influence of the senior member of the family", he pleaded helplessness in the matter in view of the 'prevalent interpretation of Section 6' and sentenced the young accused to one year's imprisonment.

In *J. K. Prasad v. State*¹⁵ the same story was repeated. The offender aged 19 was convicted under Section 326 read with Section 149 of the I. P. C. and sentenced to five years' imprisonment which on appeal was ~~reduced to~~ three. The Supreme Court while holding that the

object of the Act is to prevent the conversion of youthful offenders into obdurate criminals as a result of their association with hardened criminals of mature age in case the youthful offenders are sentenced to undergo imprisonment in jail,

upheld the prison sentence as the offence carried a sentence of life imprisonment.

Sometimes the courts, it seems, have not really applied their mind to the question as to whether the offender deserved probation on the merit of the case and decisions have focussed more attention on some questions of technical nature. For instance, in some cases the question which arose for consideration was whether the age of the offender for the purpose of Section 6 of the Act was to be considered with reference to the date of the commission of the offence

13. Lotika Sarkar : PROBATION OF OFFENDERS ACT, 1958 : A RE-APPRAISAL.

14. AIR 1965 Raj 74.

15. (1972) 2 SCC 633.

or to the date when the offender is convicted. In *Ramji Missar v. State of Bihar*¹⁶ the Supreme Court held that the relevant date was at the point of time when the court has to choose between the two alternatives i.e. imprisonment and probation. It was observed :

The object of the Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime. If this were borne in mind it would be clear that the age referred to by the opening words of Section 6(1) should be that when the court is dealing with the offender....

It is submitted that though it may be the correct legal position, as held by the Supreme Court, that the age of the offender relevant to Section 6 is to be reckoned at the time of disposal of the case by the Court, it is not very correct for the Supreme Court to say that the object of the Act is to prevent the turning of youthful offenders into criminals by coming into contact with hardened criminals. Section 6 certainly emphasises the importance of probation for young offenders but the overall object of the Act is to protect offenders of selected types irrespective of the age factor.

In the case cited above, two brothers Ramji and Baist were convicted for offences of attempted murder, grievous hurt and hurt under Sections 307, 326 and 324 of the Penal Code respectively. The elder brother Ramji, who was below 21 years at the time of the commission of the offence but above 21 years at the time of sentence, was sentenced to rigorous imprisonment for 2 years under Section 324 of the Penal Code. Baist, the younger brother who was of 19 years, was convicted of attempted murder and grievous hurt under Sections 307 and 326 of the Code and was sentenced for six and four years' rigorous imprisonment respectively. The trial Court did not grant probation to any of them. In case of Baist it was not possible to release him on probation since the offences under Sections 307 and 326 are punishable with life imprisonment. The trial Judge refused to grant probation to Ramji since the assault committed by him was 'premeditated'. On appeal, the High Court found Baist guilty of the offence of hurt under Section 324 and imprisonment for two years was

16. 1963 Supp 2 SCR 745 : (1963) 2 Cri LJ 173.

substituted in place of the sentence passed by the trial Court. The conviction of Ramji under Section 324 was upheld but since he was suffering from tuberculosis the sentence of imprisonment was reduced from 2 years to 9 months. Both the brothers were refused probation by the High Court. It was refused to Ramji on the ground that he was above 21 years and in case of Baist the High Court refused to exercise what it thought to be its discretion. It was unfortunate that despite the finding of the High Court that no proper reasons were given by the trial Court while refusing probation to Ramji, his case was decided solely on the point that his case was not covered by Section 6 of the Act. On appeal, the Supreme Court did come to the rescue of the younger brother by directing the High Court to exercise its discretion on the basis that it was judging the matter with reference to the criteria laid down in Section 6 of the Act but confined itself to the question of age so far as the case of Ramji was concerned. It appears that even independent of Section 6, which was found inapplicable to Ramji, probation could have been granted to him.

The above case brings forth another factor which must be given due consideration while deciding whether an offender is to be given probation or not. The factor is that of the length of the sentence of imprisonment which is to be given as an alternative to release on probation. Whether the object of imprisonment is to cause incapacitation of the offender to commit crime or it is to effect reformation of the offender, in either case a short imprisonment is not going to deliver the goods. In the case cited above, the imprisonment of 9 months just does not make any sense from any plausible angle. As an ordinary rule of prudence it can be stated that short-term imprisonments should always be avoided as far as possible either by employing probation or some other alternative.

It must also be seen, while deciding the question of probation, as to what will be the effect of the particular decision on the morale of law enforcement officers, other offenders or prisoners and on correctional staff. Each decision is likely to have an impact on many other persons and hence this dimension must not be ignored.

In *Akhtar Munir v. Emperor*¹⁷, a person was convicted under the Arms Act for possessing an unlicensed dagger. No sentence

17. AIR 1937 Pesh 51.

was passed but he was placed on security under Section 562 of the Criminal Procedure Code¹⁸. The reasons given for not imposing sentence were as follows: (i) The accused was a lambardar; (ii) he was 30 years of age; and (iii) it was his first offence. It was held on appeal to the High Court that the first reason was no reason whatever for leniency. The position of the offender, if at all relevant, showed that he should have set a better example for others. To treat him leniently because he held that position would be to differentiate the application of law as between responsible and irresponsible persons in favour of the former. The second reason regarding age also did not carry any weight because at that age he was fully responsible for his actions and capable of realizing their nature to the full. If the punishment was waived merely because he was a first offender, the principle would have to be applied in all similar cases under the Arms Act. It was, therefore held that the law should take its normal course and if not allowed to do so, the result would be that an exception would be made in favour of an offender merely because he was a man of above average position which would amount to gross failure of justice.

✓ In the case of *Atmacoori v. State*¹⁹, however, 'respectability' of the offender was given due consideration by the Orissa High Court. A merchant from Berhampur was caught with 13 maunds and 16 seers of poppyseed from his godown and shop. He was given the benefit of the Act because in the opinion of the Court he was a "respectable merchant" and a "fairly important businessman". They were also impressed by the fact that the poppyseeds being stored by the merchant was not for "preparing opium for his consumption but for carrying on the business of despatching... and making some profit". It is obvious that no consideration was given by the court of 'setting good example' by the 'respectable merchant' as it was done by the Peshawar High Court in *Akhtar Munir's case*.

A peculiar fact situation was involved in a case decided by the Rajasthan High Court in *Ahmad v. State*²⁰, where one Ahmad

18. This provision was almost similar to S. 4 of the Probation Act, 1958 and was operative before the present Act and enforced in the various States.

19. AIR 1967 Ori 54.

20. AIR 1967 Raj 190.

and his friend were convicted for stealing an idol from a temple. In sentencing them to imprisonment and refusing them the benefit of probation, the Rajasthan High Court referred to the "explosive situation which could have triggered off a chain of reactions producing results which may have been more lamentable and far-reaching. This case has no place for leniency or grant of probation".

Prof. Lotika Sarkar expresses her inability to reconcile the judicial attitudes in the Orissa and the Rajasthan cases in the following words :

In both the cases the interests of society had to be protected and interests of the individual had been judged against this background. Whether stealing an idol was more injurious to society than storing poppyseeds and helping in the preparation of opium is a matter of opinion.

Professor Sarkar is perfectly justified in asserting that the Rajasthan case was not worse than the Orissa case, considering the interests of the society from the angle of the enormity or dangerous nature of the two offences. The Rajasthan court, however, seems to have considered something more which raises a problem of greater significance and complexity. By using the expression "explosive situation which could have triggered off a chain of reactions producing results...more lamentable and far-reaching" the Rajasthan court appears to have implied that it was not an ordinary theft case but something more serious involving religious and communal passions. The court was probably concerned about the communal disturbances which might have erupted and that it would be a risky proposition to release the offender in this particular context. Whether the court was justified in estimating the potential danger to the extent it did, is a question which involves conjecture and hence cannot be answered even with a fair amount of precision. But whether the courts should deny probation in an otherwise fit case on such considerations is an entirely different matter. The court, it appears, did not confine itself to the question of the interests of society in the usual context i.e. whether the offender would be reformed or not and what were the chances of his committing similar offences in future if released on probation, but it applied policy considerations in a different and an unusual context.

An extreme example of public policy being considered in deciding the question of probation is presented by an English case where an elderly woman of small means, pleaded guilty of a charge of having attempted to take out of the country £85 sterling knowing that she was permitted to take only £5 sterling under the Exchange Control Act, 1947. She pleaded that "it was a matter of life and death" that she should take the money to her son in Italy, who had no work and was in debt. She was released on probation but on appeal it was held that it was extremely difficult to imagine any circumstances which would justify a court in treating an offence under the Exchange Control Act, 1947, as a trivial offence, and that, as the respondent, by her own admission, knew that she was committing and intended to commit an offence, the justices were not justified in dealing with the case under the Probation Act. The case was remitted to the justices with a direction that a penalty must be inflicted, and that it must not be a nominal penalty.²¹

This was a case where too much emphasis was given on the enforcement problem of an Act regulating a country's economy resulting in great harshness to the offender who did not, as such, have any criminal propensities and was probably a good case for probation. Contrary to this sort of judicial attitude is the one reflected in an American case where considerations for individual offender outweighed the possible risk in releasing a confirmed drug addict and one who was responsible for the sale of narcotics in certain college campuses.²² A judge of the Judicial Circuit had found the accused guilty of violating the drug laws and refused to grant probation in view of the seriousness of the offence. The appellate Court disagreed with the verdict regarding probation and sent back the case to another judge of the Judicial Circuit for reconsideration of the application for probation. The appellate Court was influenced by the fact that the 'defendant had, until recently, been a boy of excellent character who received a commendation as a National Merit Scholar and had been accepted for attendance at Boys State by the American Legion'. Also, the record indicated that this was the first time that the defendant had ever experienced any kind of trouble with the law, and that his mother and

21. (1949) 2 All ER 705.

22. *People v. McAndrew*, Appellate Court of Illinois, 1968.

stepfather were ready and willing to furnish him excellent psychiatric care.

The problem of public policy assumed greater significance in the context of socio-economic or white-collar crimes and the choice of punitive sanctions in preference to the rehabilitative ideal is obvious. The Supreme Court, speaking through Krishna Iyer, J. has made it absolutely clear that the philosophy of Probation of Offenders Act, 1958 is not suitable for persons indulging in activities such as adulteration of food.²³ It was observed :

The rehabilitative purpose of the Probation of Offenders Act, 1958 is pervasive enough technically to take within its wings an offence even under the Prevention of Food Adulteration Act. The kindly application of the probation principles to offences under Prevention of Food Adulteration Act, however, is negated by the imperatives of social defence and the improbabilities of moral proselytisation. No chances can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. Secondly, these economic offences committed by white-collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-making from number of consumers furnishes the incentives—not easily humanised by the therapeutic probationary measure. It is not without significance that the recent report (Forty-seventh Report) of the Law Commission of India has recommended the exclusion of the Act to social and economic offences by suitable amendments.

The Law Commission was quoted in the context as follows :

We appreciate that the suggested amendment would be in apparent conflict with the current trends in sentencing. But ultimately, the justification of all sentencing is the protection of society. There are occasions when an offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way, because of the paramount need for the protection of society.

The Court noted that the conditions of the probation services in India did not warrant the inclusion of such offences at

23. *Pyarali K. Tejani v. Mahadeo Ramchandra Dange*, (1974) 1 SCC 167 : 1974 SCC(Cri) 87.

present though a different approach might be needed in the future.

Model Penal Code, Proposed Official Draft, 1962

In connection with the consideration of various factors by the courts, the provisions made in the Model Penal Code drafted by the American Law Institute may be useful as guidelines for probation policy, which are as follows.²⁴

(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because :

- (a) there is undue risk that during the period of a suspended sentence or a probation the defendant will commit another crime ; or
- (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution ; or
- (c) a lesser sentence will depreciate the seriousness of the defendant's crime.

(2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favour of withholding sentence of imprisonment :

- (a) the defendants' criminal conduct neither caused nor threatened serious harm ;
- (b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm ;
- (c) the defendant acted under a strong provocation ;
- (d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defence ;
- (e) the victim of the defendant's criminal conduct induced or facilitated its commission ;

24. Section 7.01 : Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation.

- (f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury he sustained ;
- (g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime ;
- (h) the defendant's criminal conduct was the result of circumstances unlikely to recur ;
- (i) the character and attitude of the defendant indicate that he is unlikely to commit another crime ;
- (j) the defendant is particularly likely to respond affirmatively to probation treatment ;
- (k) the imprisonment of the defendant would entail excessive hardship to himself or his dependants.

(3) When a person who has been convicted of a crime is not sentenced to imprisonment the court shall place him on probation if he is in need of the supervision, guidance, assistance or direction that the probation service can provide.

Prediction Tables

An important aid in probation decisions can be provided by what are known as 'prediction tables'. Prediction implies anticipation of the probable result of the correctional treatment on a particular offender. This can be done if some data is available regarding the response of similarly situated offenders to the probation and parole programmes in the past. The prediction tables may, therefore, be defined as any compilation of statistics on the post-release behaviour of different types of offenders. The prediction tables can only serve to supplement the estimate of the offender's personality which requires the individualized study of the variable factors connected with the offender. Because the prediction tables are based on the past experience of the correctional agencies, they cannot take care of any changes which might have taken place in the environmental factors in the period between the compilation of the statistics and the presentation of an individual offender's case before the court.

The advantages of prediction tables are that inconsistencies can be avoided to some extent by applying the standard tests in all the cases coming up for probation and parole decisions. After the cases which are clearly inappropriate for parole and probation, the courts are left with relatively fewer cases where more intensive studies of individual needs are possible. They are useful for responses to public criticism. If, for instance, a parole board is asked, "Why did you parole that murderer?" the board can cite the low violation rate of paroled murderers when compared with other types of offenders.²⁵

Supervision in Probation and Parole

The major objectives of probation and parole are the rehabilitation of the offender and the protection of society from his actions at the same time. Accordingly, the duty of the probation agent, commonly known as probation officer, should be to see that effective programme for the rehabilitation of the offender is prescribed and implemented and the responses of the offender are watched. In case of positive response the probation officer has to continue the good work but in case of negative response of a substantive degree reflected in violation of probation or parole order, the agent has to take suitable action which may even extend to recommending the alternative prison term to the court. While including certain positive values in the offender, the probation or parole agent has to provide help, counsel and guidance for the client which require high competency and involvement on the part of the agent. In dealing with the other aspect of the supervision that no violations of the probation or parole orders go unnoticed and unreported to the appropriate court, the agent works like a policeman. The true challenge to the agent is not in his work as a policeman but in his capacity to make the client adjust to the community.

David Dressler describes four general techniques which are employed by supervision agents.²⁶

1. *Manipulative techniques.*—By employing this technique,

25. John W. Mannering: "Current Plans for use of Parole Experience Tables in Wisconsin", quoted by Elmer H. Johnson: *CRIME, CORRECTION AND SOCIETY*, pp. 688-89.

26. *PRACTICE AND THEORY OF PROBATION AND PAROLE*, 1959 (Columbia University Press).

modification is sought in the offender's environment in terms of family relationship, employment and community life.

2. *Executive techniques.*—Here the probation or parole officer tries to help the offender by referring him to the appropriate organisation like public and private welfare agencies, recreational programmes and employment services.

3. *Guidance techniques.*—The agent may give advice or even help the client through psychological methods which do not require great professional training or skill in the agents. The client is encouraged to be self-reliant and recognition is given to any good factors in the client's personality.

4. *Counselling techniques.*—These techniques differ from the guidance techniques in the sense that these require training and skill which are not possessed by probation and parole agents ordinarily. These techniques are needed to solve serious personality problems.

It is apparent from the discussion of the nature of supervision involved in parole and probation that, before an offender is released either on parole or probation, it must be seen whether the probation agent has the skill needed for dealing with the client and also whether he would have adequate time to devote to the client. One of the serious arguments against probation and parole schemes is that the workload of the agents is too heavy to be taken care of in a conscientious and responsible manner. The following figures would give some idea of the case-load of the probation and parole agents in India for the period 1964-68.²⁷

The probation scheme has been extended to 182 districts in India up to the year 1968. The average number of probation officers in 1968 in the country was 377 including the voluntary probation officers. There is no criteria or standard prescribed by any State for the workload on a probation officer. The five-year statistics show a slight increase in the number of inquiries received from courts or institutions etc. and the number of probationers under supervision. The inquiries in 1968 were 136 while supervision cases were 54 per probation officer. It is evident that for one

27. PROBATION AND PRISONS: A STATISTICAL ANALYSIS, Central Bureau of Correctional Services, 1964-68.

probation officer to dispose of 136 inquiries and to deal with 54 probationers in one year is quite a stupendous task. Statistical studies reveal that about 85 per cent of the convicts come to Indian jails with terms of less than 6 months.²⁸ Obviously most of these convicts should provide good human material for probation services but the proportion of those who are released on probation to those sent to prisons is very low. In fact what was said by Chief Justice S.M. Sikri not long back reveals the extent to which the probation services are being given a back seat in the Indian judicial system. He observed :

As a matter of fact I was shocked to see that in a number of cases, which came to the Supreme Court recently, even the existence of the local Probation of Offenders Act was not known or easily ascertainable. No reference to the relevant Probation Act was made in the courts below but the point was for the first time taken in the grounds for special leave to appeal to the Supreme Court.²⁹

If India has to go in for probation programmes in a sincere and effective way, it needs personnel many more in number than we have at present and a better awareness of the probation system shall have to be created.

Probation of Offenders Act, 1958—An appraisal

In 1951 the United Nations Economic and Social Council recommended the adoption and extension of probation system by all the countries as a major instrument of policy in the field of prevention of crime and the treatment of offenders. At that time the only piece of central legislation reflecting probation philosophy was Section 562 of the Code of Criminal Procedure which gave discretion to a criminal court to release a person who was convicted of an offence punishable with imprisonment for not more than seven years on probation of good conduct by entering into a bond, with or without sureties. The section also provided that anyone convicted of theft, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with up to two years of imprisonment could be released after due admonition. The central

28. SOCIAL DEFENCE IN INDIA, Central Bureau of Correctional Services, 1970.

29. JUDGES AND PROBATION, p. 1, Central Bureau of Correctional Services 1971.

legislature extended the scope of the probation technique, as recommended by the UNESCO, by enacting the comprehensive Act of 1958. A critical evaluation of some of the provisions of the Act may be made in the light of the problems which have had to be faced due to judicial pronouncements or otherwise.

One criticism which has been levelled at the Act is the unsupervised release, permitted by Section 3 of the Act, after due admonition in offences like theft, cheating or any offence punishable with imprisonment up to two years. The section applies to first offenders and the court has to use discretion in view of the circumstances of the case including the nature of the offence and the character of the offender. The courts, it appears, use this discretion quite liberally. The provision has been criticised on the ground that it does not require the court to call for a report from the probation officer and hence the court would not possess the information to decide the issue of the character of the person and other relevant facts. There is no doubt that not only would the situation be much more satisfactory if the report of the probation officer is made available, but also, if the release is made under the supervision of a probation officer. At present this is not at all required under Section 3 of the Act. This should particularly be provided for in view of the fact that many cases of theft and cheating are really not petty in nature and may reflect dangerous criminal potentialities in the offender. At present there are only two alternatives for the court in offences falling under Section 3, *viz.* to release the offender with mere admonition or to send him to prison. Release after admonition on probation should provide a better alternative in many cases. But it is also doubtful whether it would be possible to provide supervision in all the cases where offenders are released under Section 3 or even to have the report of a probation officer before the action is taken under Section 3 in view of the very insignificant number of probation officers in the country. It may also be observed that even without any report of the probation officer, the courts would not exactly be groping in absolute darkness regarding the facts connected with the character and other factors about the accused. The circumstances of the crime and even the character of the offender become fairly clear to the court during the ordinary course of the proceedings.

It may be noted, however, that release of an offender without

supervision is not restricted to Section 3 only. Even under Section 4, which is the key section in the Act, the court may release a person on probation on his entering into a bond with or without sureties. Sub-section (3) of the section, however, provides for an additional order of supervision if 'in the interests of the offender and of the public it is expedient so to do'. In other words Section 4 of the Act has not fully incorporated the philosophy of probation in which supervision is an essential element. In fact Section 4, it appears, is a combination of probation and the type of preventive action which can be taken by the court under the Code of Criminal Procedure against a vagrant or a person convicted of an offence.

Section 6 of the Act provides for the consideration of the probation officer's report when the decision to grant or refuse probation to a person below the age of 21 years is to be taken. But it seems that though the court has a duty to call for a report of the probation officer, it may take the final decision even if no such report is forthcoming or made available. This is the conclusion which follows from the expression 'if any' occurring after the words 'and consider the report'.³⁰ It follows, therefore, that it is not only in cases of release after admonition under Section 3 but also in some other situations that the court may not have the benefit of the report by a probation officer.

Confidential nature of the Probation Report

Under the Act it is provided that the report of the probation officer referred to in Sections 4 and 6 of the Act should be treated as confidential.³¹ An exception, however, has been provided that the court may, if it so thinks fit, communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report. The exception is obviously meant to give an opportunity to the offender to rebut by producing evidence anything unfavourable to him in the report. In the public interest it shall be equally worthwhile to give the same opportunity to the prosecution by communicating any report favourable to the accused after the conviction because the prosecution may be in possession of some material

30. Section 6(2).

31. Section 7.

which may help them in rebutting something in the probation officer's report. At present such a communication to the police is not possible under the Act.

Problem of Bond and Sureties

A problem which defies an easy solution is that the court can release an offender on probation only on his entering into a bond with or without sureties. It is also provided that it is necessary that the offender or his surety, if any, has a fixed place of abode or regular occupation within the area of the jurisdiction of the court.³² Now many offenders in need of such a release are not in a position to provide sureties and cannot be released on their own bond without sureties either because many of them do not have a fixed place of abode or they do not have any regular occupation. The result is, as observed by Prof. Lotika Sarkar, that the imprisonment which the court wishes to avoid comes in through the back door.

In her paper *Probation of Offenders Act—A Re-appraisal* referred to earlier, she cites the case of a person who had been convicted for stealing some biscuits and cigarettes from a railway vendor's shop. He was offered probation but as he possessed no property of his own nor could give sureties, he was sent to jail.

It is obvious that the court is absolutely helpless in such cases. Even the legislature cannot do anything to tackle such problems on the basis of probation since to release a person on probation without retaining any control whatsoever over him is simply meaningless. It is quite another matter that in a welfare State, it is the duty of the government to provide everyone with employment and a fixed place of abode. It is submitted, however, that the hard cases, like the one mentioned above, can be taken care of under Section 3 of the Act by providing release to the offender after admonition.

Extent and Results of Probation Work in India

As noted earlier, the Central Probation Act was enacted in 1958. Before the enactment of 1958, many States had their own probation laws and some of them continue to have them even now. Most of the States have, however, adopted the Probation of

32. Section 4 (1).

Offenders Act, 1958. The following table gives the information relating to the enforcement of various probation laws in different States and the extent to which probation schemes have been extended to the various parts of the country up to 1968.³³

S. No.	State/Union territory	Name of the Probation Act in force	Total No. of Districts	No. of Districts covered
1	Andhra Pradesh	1. Probation of Offenders Act, 1958	20	5
		2. Madras Probation of Offenders Act, 1936		15
2	Assam	Probation of Offenders Act, 1958	11	11
3	Haryana	—do—	7	7
4	Gujarat	Bombay Probation of Offenders Act, 1938	17	17
5	Kerala	Probation of Offenders Act, 1958	9	9
6	Madhya Pradesh	—do—	43	42
7	Maharashtra	1. C. P. and Berar Act, 1958	27	4
		2. Bombay Probation of Offenders Act, 1938		8
		3. Probation of Offenders Act, 1958		13
8	Mysore	Probation of Offenders Act, 1958	19	19
9	Orissa	—do—	13	13
10	Punjab	—do—	11	11
11	Rajasthan	—do—	26	26
12	Tamil Nadu	—do—	13	13
13	Uttar Pradesh	U. P. First Offenders Probation Act, 1938	54	32
14	West Bengal	1. The West Bengal Offenders Released on Probation and Ammunition Act, 1954	16	7
		2. Probation of Offenders Act, 1958		9

33. PROBATION AND PRISONS, 1964-68, Central Bureau of Correctional Services.

S. No.	State/Union territory	Name of the Probation Act in force	Total No. of Districts covered	No. of Districts covered
15.	Delhi	Probation of Offenders Act, 1958	1	entire territory
16.	Manipur	—do—	1	—do—
17.	Pondicherry	—do—	1	—do—
18.	Tripura	—do—	1	—do—
19.	Goa	—do—	3	—do—

The total number of offenders placed on probation under Probation of Offenders Act, 1958 and other similar legislations was 33,094 in various States for which figures are available for the period 1964-68. These figures do not include those who were put on probation under Children Acts during the same period. The break-up for the States is as shown by the table below :

S. No.	State/Union territory	No. of offenders on probation
1	Andhra Pradesh	2623
2	Gujarat	1453
3	Haryana	738
4	Kerala	1714
5	Maharashtra	808
6	Mysore	484
7	Punjab	1606
8	Rajasthan	1733
9	Tamil Nadu	9478
10	Uttar Pradesh	8616 (Figures for 1968 not included.)
11	Delhi	360
12	Tripura	98

Results of the Supervision

During the period 1964-68, the number of offenders whose term of supervision came to an end as scheduled was 30,825 while

the number of those whose term of supervision was terminated prematurely due to good behaviour and by appeal to a court was 1048 and 411 respectively. The figures show that about 90% of the offenders completed their period of supervision as originally scheduled.

The number of cases where probation order was revoked, either due to some violation of the probation order or due to the committal of fresh crimes by the probationer, was insignificant. The number of probation orders revoked was 1238, out of which 628 orders were revoked due to violations of probation orders and 610 by the commitment of fresh crimes by the probationers.

The results, as shown by the above figures, indicate that the majority of the offenders placed on probation did well under the scheme. How far the reports of the probation officers, which formed the basis of the court action, portray the true picture of the behaviour of the offenders during probation period is a different story altogether.

According to Nigel Walker, it is still possible, even at conferences of experienced judges and magistrates, to hear anecdotes of the form: 'I remember sentencing a man with twenty previous convictions. I put him on probation two years ago, and the probation officer told me the other day that he is doing well.' It should not be necessary to point out either that the probation officer's report is not very strong evidence of permanent reform, or that, even if it were, a single case is not evidence in the scientific sense.³⁴

Evaluation of Probation and Parole

The advantages of probation and parole have been mentioned in terms of the protection of the offenders' personality from the contaminating influence of prison life. The released offender has the advantage of continuing to have normal social relationships and his employment. The offender is also spared of the stigma of a prison sentence making the task of rehabilitation easier. A study undertaken in the Michigan State of U. S. A. proved that in the

34. SENTENCING IN A RATIONAL SOCIETY, p. 90.

ultimate analysis, it is more economical to conduct probation services than to construct new prisons and maintain them.³⁵ It is also pointed out that unlike the dependants of an offender sent to prison, the dependants of a probationer do not have to be supported by welfare agencies.

Notwithstanding the strength of these points in favour of probation and parole, they have been severely criticised. It is said that while inadequate supervision may not serve the purpose of correction, any intensive programme is bound to be too much of an economic burden.

A study carried out by Dr. W. H. Hammond of the Home Office Research Unit of England disclosed among other things that probation had lesser corrective efficacy than imprisonment. In other words probation was followed by more reconvictions than imprisonment. The consequences of maladministration of the parole and probation programmes have been described by J. Edgar Hoover in the following words :

No less than 92 of the 109 dangerous criminals listed among the FBI's "Ten Most Wanted Fugitives" since March, 1950, had been the recipients of parole, probation or other forms of clemency. The service martyr plaques of the Nation's police agencies are filled with the names of dedicated men slain at the hands of gunmen who were the recipients of ill-advised clemency.³⁶

The criticism of Hoover is obviously not against probation or parole as such but against their maladministration. The two techniques have many qualities to commend themselves for dealing with selected offenders only. The real problem in probation and parole is to make the proper selection of cases and then to pursue them with all the vigour and resources at one's command.

35. The Saginaw Probation Demonstration Project: Michigan Crime and Delinquency Council, 1963.

36. "Statement of Director J. Edgar Hoover", FBI Law Enforcement Bulletin XXVII (November, 1958).

THERAPEUTIC APPROACH—JUVENILE INSTITUTIONS

Juvenile Delinquency and Juvenile Institutions

The most interesting aspect of the subject of juvenile delinquency is that in every age it has been regarded as a problem peculiar to the contemporary society while the fact is that like adult criminal behaviour it has always existed in some form or the other and there is no apparent reason to expect that it will not remain so in the future. This phenomenon has a two-dimensional basis. Firstly, the violation of any code of conduct, whether for adults or for young persons, is inevitable. Secondly, the definition of juvenile delinquency as deviant child behaviour itself depends upon the norms laid down by the society, in other words by the elders, and clash of values due to generation gap is bound to occur. The following two quotations by Edward H. Stullken in his article *Misconception about Juvenile Delinquency* may be reproduced here in order to understand the continuing nature of the problem.¹

An Egyptian priest almost 6000 years ago wrote on the walls of a tomb :

Our earth is degenerate in these latter days. There are signs that the world is coming to an end because children no longer obey their parents.

Socrates wrote a paragraph over 2400 years ago that might well have appeared in the morning paper of today :

Children now love luxury, they have bad manners, contempt for authority, they show disrespect for elders, and love chatter in place of exercise. Children no longer rise when elders enter the room. They contradict their parents, chatter

1. Journal of Criminal Law, Criminology and Police Science, 1956; Vol. 46, No. 6, pp. 833-36.

before company, gobble up dainties at the table, cross their legs, and tyrannize over their teachers.

It is apparent, therefore, that the deviant behaviour of children has posed problems from times immemorial, and what has changed is only the nature and definition of the behaviour considered undesirable. The starting point for the discussion on juvenile delinquency is, therefore, the meaning given to the expression 'juvenile delinquency'.

Definition of Juvenile Delinquency

It is not easy to give a precise definition of juvenile delinquency. Several factors are responsible for not allowing a clear-cut formulation. One hurdle is similar to that encountered while defining crime in general *i.e.* the choice between the social and legal definitions.² Sociologists insist that legal definitions are of no help in understanding the true nature of delinquency and in knowing who are juvenile offenders, since the arrest or conviction of a child may depend upon various fortuitous circumstances. They also maintain that legal definitions differ from place to place and time to time and hence are not suitable for scientific studies. The reasons as to why legal definitions are to be preferred are the same as in the case of definition of crime.³ The legal definition of juvenile delinquency is obvious. Any act prohibited by law for children up to a prescribed age limit is juvenile delinquency and it follows, therefore, that a child found to have committed an act of juvenile delinquency by a court is a juvenile delinquent.

Another aspect of the definition problem is that quite frequently the statutes defining the various delinquent acts are vague in terms of their contents, which is contrary to the basic principle of criminal law as expressed through the latin expression, '*nullum crimen sine lege*'—no crime without law. Laws defining crimes should not be vague since the citizens must be able to know with a fair amount of certainty the acts which are proscribed for them. To quote Ruth Cavan :

Most of the behaviour which gets a child into trouble with the police and courts comes under a much less definite

2. See Chapter I.

3. *Ibid.*

part of the law on juvenile delinquency. The Illinois law defines a delinquent who is incorrigible or who is growing up in idleness, one who wanders about the streets in night time without being on any lawful business, or one who is guilty of indecent or lascivious conduct. Laws in some other States are still more vague. New Mexico rests its definition on the word "habitual". A delinquent child is one who, by habitually refusing to obey the reasonable and lawful commands of his parents or other persons of lawful authority, is deemed to be habitually uncontrolled, habitually disobedient, or habitually wayward, or who habitually is a truant from home or school; or who habitually so deports himself as to injure or endanger the morals, health or welfare of himself or others. In these laws there is no definition of such words or phrases as incorrigible, habitual, indecent conduct, or in night time. How much disobedience constitutes incorrigibility? How often may a child perform an act before it is considered habitual?⁴

This vagueness in the definition given in the statutes is defended on the ground that the maxim '*nullum crimen sine lege*' which applies in relation to criminal statutes is not relevant in delinquency laws since the latter are not created to punish the juveniles but to protect them. This justification may be evaluated with reference to the philosophy and techniques of juvenile courts discussed later in this chapter.

Juvenile delinquency laws are characterised by the feature that they prescribe many acts which are regarded as non-criminal or even socially acceptable if indulged in by adults, like drinking or smoking. Some of the acts proscribed for children would be torts if committed by adults.^{4a} The great variety of the acts declared by law to be acts of juvenile delinquency can be appreciated with the help of the following list which catalogues the acts generally prohibited in the various American States. Of course, not every State, nor any State, has all these items in its definition of delinquency. However, eight or nine items in the list are apart from and in addition to violations of law⁵:

(i) Violation of any law or ordinance.

(ii) Immoral or indecent conduct.

4. "The Concepts of Tolerance and Contraculture as Applied to Delinquency", *Sociological Quarterly*, 2(Fall 1961) p. 243.

4a. For example frequenting public places like railway yards aimlessly without criminal intention.

5. Sol Rubin: *CRIME AND JUVENILE DELINQUENCY*, 1958, p. 46.

- (iii) Immoral conduct around school.
 (iv) Engaging in illegal occupation.
 (v) Knowingly associating with vicious or immoral persons.
 (vi) Growing up in idleness or crime.
 (vii) Knowingly entering or visiting houses of ill repute.
 (viii) Patronising, visiting policy shop⁶ or gaming place.
 (ix) Patronising saloon or dramshop where liquor is sold.
 (x) Wandering in streets at night, not on lawful business.
 (xi) Habitually wandering about railroad yards and tracks.
 (xii) Jumping on to trains or entering cars or engines without authority.
 (xiii) Habitually remaining truant from school.
 (xiv) Incurable.
 (xv) Habitually using vile, obscene or vulgar language in public place.
 (xvi) Absenting oneself from home without permission.
 (xvii) Loitering and sleeping in alleys.
 (xviii) Smoking cigarettes (around public places).
 (xix) Begging or receiving alms (or wandering in streets for purpose of).

The extension of the concept of juvenile delinquency to extremely wide limits has drawn criticism on the ground that it is not necessary nor desirable to use police and courts in 'private matters' which can be better tackled by families themselves. The issue was discussed by the Second United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in August 1960 in London. The Congress adopted, among other recommendations the following:

The Congress considers that the scope of the problem of juvenile delinquency should not be unnecessarily inflated. Without attempting to formulate a standard definition of what should be considered to be juvenile delinquency in each country, it recommends (a) that the meaning of the term

6. A policy shop is a place where illegal gambling on the terminal digits of certain numbers takes place.

juvenile delinquency, should be restricted as far as possible to violations of the criminal law, and (b) that even for protection, specific offences which would penalize small irregularities or maladjusted behaviour of minors but for which adults would not be prosecuted, should not be created.⁷

Earlier, even in the U. S. A. the need was felt for shrinking the extent of juvenile delinquency and the Standard Juvenile Court Act, modelled by the National Probation and Parole Association, avoids most of the items of delinquency cited in the list by Rubin. The Standard Act includes in its provisions corresponding to the usual delinquency definition, only two items in addition to violation of law or ordinance. These items are a child "who deserts his home or who is habitually disobedient or is beyond the control of his parent or other custodian; and who, being required by law to attend school, wilfully violates rules thereof or absents himself therefrom".⁸

In England, in addition to the violation of a penal statute, the children's department of a local authority, a police constable, or an officer of the National Society for the Prevention of Cruelty to Children must bring a child before a juvenile court if they have reasonable grounds for believing him to be in need of care, protection or control on any of the following grounds:

1. That the juvenile is not receiving such care, protection and guidance as a good parent may be reasonably expected to give, and in addition (i) that he is falling into bad association or is being exposed to moral danger, or (ii) that the lack of care, protection or guidance is likely to cause him unnecessary suffering or seriously to affect his health or proper development; or (iii) that he has been the victim of a sexual offence or an offence involving bodily injury, or lives in the same household as a perpetrator of an offence of this kind against a juvenile.
2. That he is beyond his parent's control.⁹

7. Manuel Lopez Rey, Adviser on Social Defence, U. N. O., in the publication of All India Crime Prevention Society, March, 1961.

8. Rubin: *CRIME AND JUVENILE DELINQUENCY*, p. 50.

9. Nigel Walker: *CRIME AND PUNISHMENT IN BRITAIN*, p. 180.

these different religions to the total population constituted 82.72% for Hindus, 11.21% for Muslims, 1.89% for Sikhs, 2.6% for Christians and 1.17% for others.

The figures show that Muslims, Christians, and Sikhs are represented in crime proportionately more as compared to their respective populations. One possible reason may be that these communities being located more in the urban areas are bound to have a higher share in the total criminality since the rural areas are relatively free from crimes.

4. *Education*.—Information relating to educational background of the juveniles arrested was collected under four heads *viz.* illiterates, below primary, above primary and below Matric/Higher Secondary, Matric/Higher Secondary and Matric/Higher Secondary and above. 53.4% of the juveniles arrested were illiterate while 33.7% were below primary. Only 2.1% of the juveniles arrested were above Matric/Higher Secondary.

The above facts and figures, though based on the juvenile crimes in 1971, give a fairly good idea of the situation over the years. There has been a steady rise in juvenile delinquency, which is of course understandable in view of the growing population, urbanisation and economic difficulties. The relative increase in delinquency shall be evident from the number of arrests of juveniles in the years before 1971.

S. No.	Years	No. of Juveniles Apprehended
1	1960	49,276
2	1966	67,257
3	1967	72,109
4	1968	73,458
5	1969	78,868
6	1970	98,845

The statistics for 1970 revealed a sharp increase of 25.4% in the volume of crime. The 1970 figures also showed that the highest percentage increase of crimes committed by juveniles over the year 1969 was recorded under 'riots' (percentage increase 123.4) followed by 73.8% and 66% increase in murders and robberies.

As regards the regional distribution of crime in 1971 the States having the dubious distinction of attaining the highest incidence of juvenile delinquency, having regard to the population, were

Maharashtra (25.6% of the total national delinquency) and Madhya Pradesh following with its share of 18.2% of delinquency. Strangely enough, U. P. and West Bengal, two highly populous States with problems of unemployment and financial difficulties, claimed only 2.7% and 2% of the total juvenile delinquency in the country.

Juvenile Courts

Juvenile offenders have always had a different type of response from the criminal law systems of most of the societies as compared to adult or grown-up offenders. This has been reflected in the difference in the concept of responsibility for the prohibited acts in case of young and mature violators of law, the obvious reasons being that persons of very young age do not possess sufficient maturity to understand the nature and consequence of their acts and it would be unjust to deal with them in the same manner as those who do not have similar disabilities. That the misbehaviour of young persons has always invoked a differential legal reaction would be manifest by pointing out that the Code of Hammurabi in 2270 B. C. prescribed specific treatments for children who disowned their parents or ran away from home.¹⁸ The Hebrews divided young people into three age categories—infant, prepubescent, and adolescent—and established increased penalties in that order. Old English law also indicated differential treatment for juvenile offences by providing less severe punishment for persons under sixteen.¹⁹ The founding of Hospes St. Michael in Rome for the rehabilitation of young people indicates a concern for this problem by the Vatican as early as the seventeenth century.²⁰ The position at present in England is that a child below the age of 10 cannot be convicted of any criminal offence because of the irrebuttable presumption that he lacks the necessary competency to commit the same.²¹ The old common law fixed the age of responsibility at seven, either by holding that a child of such tender years should not be convicted, or that he should be pardoned at once.²² Between the ages of 10 and 14, children in England are in "a twilight

18. Quoted by Haskell & Yablonsky in *CRIME AND DELINQUENCY* (1971), p. 224.

19. *Ibid.*

20. *Ibid.*

21. Children and Young Persons Act, 1933, Section 50.

22. RUSSEL ON CRIME, pp. 98-99.

(c) the faint
light of sm

zone . . . in which they are morally responsible not as a class, but as individuals, when they know their act to be wrong.²³ In India there is no criminal responsibility for children up to 7 years of age as was the position under English common law and they are in the twilight zone if in the age-group of 7 years to 12 years.²⁴

But, by and large, the concern for children's interest was confined to the question of legal responsibility or the lack of it on the basis of what Professor Glanville Williams describes as "the mystical theory of moral responsibility"²⁵ and criminal law made hardly any difference between a child, if found responsible, and an ordinary offender. There have been instances in England where children of tender years were given death sentences like the case where two kids of eight or nine years were given capital punishment for stealing a pair of shoes. The concept of separate courts, institutions and procedures for juvenile offenders is quite a recent one. Up to the latter part of the 19th century, children were tried for their offences in ordinary criminal courts both in England and the United States. It was only when the new penology, based on reformatory and rehabilitative ideals, came to be applied towards the end of the nineteenth century that it was realised that courts, procedures and prisons meant for adult offenders could hardly be expected to serve the interests of the juvenile offenders. As a result, therefore, juvenile courts came into existence with their own distinct philosophy incorporating various reforms on the basis of new theories of human behaviour. In the words of Dean Francis Allen :

These reforms were part of a broader effort to advance the welfare of children, evidenced both in the United States and Western Europe, which included the rise of public education, the development of protective services for dependent and neglected children, and agitation against child labour and other abuses of children in industry.²⁶

History of Juvenile Court movement

In England, chancery courts were the first courts which looked after the interests of children. They saw to it that parents fulfilled

23. 1954 Criminal Law Review 494, quoted in McLean and Wood : JUSTICE AND THE TREATMENT OF OFFENDERS, (1954).

24. Sections 82 and 83 of the Penal Code.

25. 1954 Criminal Law Review 493.

26. THE BORDERLAND OF CRIMINAL JUSTICE (1964), p. 46.

their duties laid down in common law which provided for support, supervision and care of the children. The chancery courts were concerned with the "neglected" and "dependent" children and not with the behavioural problems of juveniles as such. The chancery courts acted in *loco parentis* i.e. in place of parents to protect the interest of the child. The same principles of common law were applied in the U. S. A. by the courts of equity to prevent injuries to the interests of children.

The realisation that child offenders ought not to be sent to the correctional institutions meant for adults, came long before the establishment of separate juvenile courts in the U. S. A. and England. In the U. S. A. separate correctional facilities for child offenders were for the first time provided in the House of Refuge in New York city which was established in the year 1925. This led to the creation of correctional arrangements for children separate from adult offenders in other States as well, due to the efforts of the reformers who were greatly concerned with the unhealthy effects produced on young offenders by their being placed with the adult and hardened criminals in the same institutions. The number of such special institutions went up to 16 by 1960.

Illinois was the first State in the U. S. A. to pass legislation for the establishment of a juvenile court in 1899 and the term "delinquent child" was also defined under the legislation. By the year 1945 all the States had passed legislations to take care of the peculiar problems of juvenile delinquents.

While the U.S.A. was witnessing the development of juvenile courts and other institutions, a similar movement occurred in England for the differential treatment of young offenders around the same time. In 1811 the Select Committee on laws relating to Penitentiary Houses reported :

It is highly inadvisable to expose young persons of twelve or thirteen years of age to the instruction of those, who can initiate them in all the mysteries of fraud and villainy.²⁷

Giving evidence before another Select Committee in 1847, Serjeant Adams said that so far as children between 7 and 12 were concerned, "prison discipline is incompatible with their reform".²⁸

27. Quoted in McLean and Wood : CRIMINAL JUSTICE AND THE TREATMENT OF OFFENDERS, p. 179.

28. *Ibid.*

During the last hundred years or so, the trend has been the gradual elimination of imprisonment as a form of punishment for young offenders. In England this has been made possible by passing enactments like the Children Act, 1908, Children and Young Persons Act, 1933, Criminal Justice Act of 1961 and Children and Young Persons Act of 1963. Under these Acts minimum age limits for imprisonment have been gradually increased and alternatives to imprisonment like Borstal training have been provided. Under the Criminal Justice Act, 1961, the minimum age for imprisonment has been fixed at 17 and it is provided that the court must pass a sentence of Borstal training for offenders between the age of 17 and 21 if the court wishes to give a custodial sentence of 6 months to three years.²⁹ The Act of 1908 was the first legislation in England relating to juvenile courts but it did not have any elaborate provisions on the subject. The present legislation is mainly based on the scheme as laid down under the Act of 1933 and modified by the Act of 1963.

The Growth of Juvenile Institutions in India

1. *Apprentices Act, 1850.*—The young offenders were treated in India in the same manner by criminal law as adult offenders. The laws governing them sentenced them to institutions like prisons where adult and juvenile offenders were dumped together. The situation continued to remain the same even after the British take-over of the country. The first legislation concerning children came in 1850 when the Apprentices Act was passed. This Act in fact was not primarily concerned with the delinquent behaviour of children but it laid down, as the name of the Act itself implies, the provisions relating to the relationship between employers and young persons learning a trade from them as apprentices. The Act, however, did contain some provisions wherein may be discerned some of the principles and practices of the future juvenile courts and institutions. The Act provided that the father or the guardian could bind a child between the ages of 10 and 18 years up to the age of 21 years. Magistrates were authorised to act as guardian in respect of a destitute child or any child convicted of vagrancy or the commission of a petty offence and could bind him as an apprentice to learn a trade, craft or employment.³⁰

29. Criminal Justice Act, 1961, Sections 2 and 3.

30. The Act was repealed by the Apprentices Act, 1961 which does not contain provisions relating to destitute or delinquent children. Children's Acts, passed in the meantime, have taken care of these problems.

2. *Reformatory Schools Act, 1897.*—This Act is a landmark in juvenile legislation in India. The considerations which lead to separate correctional institutions for young offenders in the U.S.A. and England had their impact in India as well. Under this Act a beginning was made for incorporating the rehabilitative techniques in the penal philosophy for juvenile offenders. The Act provided that young offenders up to 15 years of age found guilty of offences punishable with imprisonment or transportation were not to be sent to ordinary prisons but to reformatory schools. The Act even today acts as the basic law in those areas where no Children's Acts or any other special laws dealing with juvenile offenders have been enacted.

3. *Relevant provisions in the Code of Criminal Procedure.*—The Code of Criminal Procedure of 1898 contained provisions³¹ regarding the jurisdiction of criminal courts and custody of juvenile offenders. The present position under the Code of Criminal Procedure, 1973 regarding jurisdiction is as follows :

Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the court is under the age of 16 years may be tried by the Court of Chief Judicial Magistrate, or by any Court specially empowered under the Children Act, 1960 (60 of 1960) or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.³²

4. *The Children Acts.*—The years from 1920 onwards saw legislation for juvenile courts and other institutions in the various parts of the country in the form of Children's Acts. The first Children Act was passed by Madras in 1920 followed by Bengal and Bombay in 1922 and 1924 respectively. Five more provinces had Children Acts by the time the country got its independence and many more States have enacted legislation during the years after independence. The most significant development is the Central enactment for Delhi and other Union territories.

The Distinctive Characteristics of Juvenile Courts

The historical development of the juvenile courts shows that the motivating force which created them was the concern for

31. Sections 29B and 399.

32. Criminal Procedure Code, 1973, Section 27.

children and not of punishing them for any proscribed behaviour. The same idea may be conveyed by saying that the courts were visualised as *parens patriae*, to act in place of the parents in case of their failure to take proper care of the child or their being absent to supervise and support him. Whether the juvenile courts fulfilled the role of parents in cases where it was needed is a different issue which has been raised quite recently, but the assumptions made regarding the role of these courts lead to a very special type of procedure and practice in them. The salient features of the difference between the juvenile and adult courts are reflected in the following aspects :

A. Separate hearings for children's cases

The juvenile courts are meant exclusively for children. These courts are either distinct and independent of ordinary courts in terms of personnel or may be parts of the ordinary courts with wider jurisdiction. There may be wholetime judges for these courts or magistrates and judges of ordinary courts may be given special duties in the juvenile courts.

The principle that children are to be tried by juvenile courts is, however, subject to certain exceptions. For instance, a child or a young person charged with homicide must be tried by a higher court in England.³³ In India, the juvenile courts do not have jurisdiction in offences punishable with death or life imprisonment.³⁴

B. Informal hearing

خلاصہ محمول یا بے فائدہ
خلاصہ دستور

The proceedings in a juvenile court are characterized by the nature of the hearing which is very simple and informal compared to the one in adult courts. Unlike the position in adult courts, where the procedure and evidence are based on legalistic considerations, the proceedings in a juvenile court are somewhat in the nature of a conference taking place between the judge, the probation officer, the social worker, the child and the parents. The issue, generally speaking, is not whether the child committed an alleged offence, since that is ordinarily not denied, but why he did so, and so what is more relevant is social rather than legal evidence. The

33. Magistrate's Courts Act, 1952, Section 21.

34. Code of Criminal Procedure, 1973, Section 27.

report of the probation officer assumes great significance in this context.³⁵

C. *Private hearing*

Unlike the adult courts, only those who are directly concerned with the case are allowed to be present inside the court. Apart from the judge and the court officials like probation officers, the only persons allowed at the hearing are the child, the parents and the police officers involved in the process. The court may order even any one of these persons to withdraw from the court if so required in the interest of the child. Unless it is in the interest of the child, the press are not allowed to report the proceedings, offender's name, address or school, or any other particulars likely to identify him or to publish a picture of him.³⁶

D. *No right to lawyer*

Since the procedure and evidence in a juvenile court are of informal nature and the assumption is that everything there is done in the interest of the child, there is no right provided to have a lawyer for the child, which is a constitutional right of adult offenders.³⁷ Lawyers may appear only with the permission of the court.

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E. *Protection against legal consequences and stigma*

The law provides certain safeguards to save the juvenile offenders from the criminal stigma and from disabilities arising out of the legal consequences of an action by the juvenile court. In England, the words 'conviction' and 'sentence' must not be applied to juveniles tried summarily; instead the terms 'finding of guilt' and 'order made upon a finding of guilt' are used. Nigel Walker wonders rightly though as to whether the 'verbal safeguard' really protects the child offender from stigma.³⁹ Laws may also provide that no disqualification would be attached to the child delinquent due to conviction in a juvenile court.⁴⁰

35. See Sections 19, 20 and 33 of the Children Act, 1960, which deal with probation officers' reports and special procedure permissible under the Act.

36. Sections 28, 36 of the Children Act, 1960.

37. Constitution of India, Article 22 (1).

38. Children and Young Persons Act, 1933, Section 59 as amended.

39. CRIME AND PUNISHMENT IN BRITAIN, p. 176.

40. Children Act, 1960, Section 25.

F. Appeals from the Juvenile Court's orders

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An appeal can be made both against conviction as well as acquittal of an adult offender by an ordinary criminal law court. A second appeal is also possible in certain cases. In case of juvenile courts the right of appeal may not be available or it may be well regulated. Under the Children Act of 1960 it is laid down that no appeal shall lie from (a) any order of acquittal made by the Children's Court in respect of a child alleged to have committed an offence or (b) order of the Board that the child is not neglected.⁴¹

It is further laid down that only one appeal against the order of conviction shall lie to the Sessions Court whose decision shall be final.

Juvenile Courts and Constitutional Safeguards

The peculiarities of the juvenile court procedure have given rise to a paradox which has resulted in some problems of constitutional law in the U. S. A. The paradox is provided by the interesting situation that the courts work on the assumption that they act on behalf of children and in the process the child offenders are denied certain constitutional and legal rights which are available to adult offenders. Sometimes the consequences of a juvenile court action may be more severe as compared to the consequences the child might have suffered at the hands of an adult court.

The first case where the constitutional validity of the juvenile court procedure was challenged before the U. S. Supreme Court was that of Holmes in 1955 in which the court even refused to give a hearing on the basis of constitutional and legal issues raised, which were as follows :

- (i) Holmes had not been represented by counsel.
- (ii) He had not been informed of the specific charges against him (Holmes was arrested while in a stolen car driven by another boy).
- (iii) He was not informed of his constitutional rights, particularly of his right to refuse to testify.

41. Section 37.

- (iv) Testimony admitted into evidence at his trial was incompetent and inadmissible.
- (v) The competent evidence presented at the trial did not link Holmes with any illegal acts.

In an appeal to the Supreme Court that the due process was not followed in depriving Holmes of his liberty, which violated Fourteenth Amendment of the Constitution, the court held, without hearing the case on merit, that "since juvenile courts are not criminal courts, the constitutional rights granted to persons accused to crime are not applicable to the children before them".⁴² This position of the court was based on the proposition that it was not that the juvenile court aimed to punish Holmes but it was only to salvage him and safeguard his interests.

Paul W. Tappan expressed his viewpoint against the deprivation of the due process right to juveniles in the following words:

It has been popular practice thus to rationalize the abandonment, partial or complete, of even the most basic conceptions of due process of law; right to counsel and appeal; rejection of prejudicial, irrelevant, and hearsay testimony; adjudication only upon proof or upon a plea of guilt. The presumption is commonly adopted that since the State has determined to protect and save its wards, it will do no injury to them through its diverse officials, so that these children need no due process protections against injury. Several exposures to court; a jail remand of days, weeks, or even months; and a long period in a correctional school with young thieves, muggers, and murderers—these can do no conceivable harm if the States' purpose be beneficent and the procedure be "chancery"; children are adjudicated in this way everyday without visible manifestations of due process. They are incarcerated. They become adult criminals, too, in thankless disregard of the States' good intention as *parens patriae*.⁴³

A few years afterwards Gault, a young boy, was given an indeterminate sentence by an Arizona juvenile court for conveying obscene expression to a woman neighbour over the telephone. The Arizona law did not provide for any appeal from the decision of a juvenile court. The Arizona appellate court refused to review the findings of the juvenile court. An appeal was therefore made

42. *In re Holmes*, (1955).

43. JUVENILE DELINQUENCY, p. 205.

to the U.S. Supreme Court that Gault was not given notice of the charges against him nor was he given the right to have a lawyer. Also that he was not allowed to cross-examine the witnesses against him and was made to give self-incriminating answer in the proceedings. Further, the conviction was challenged on the ground that a transcript of the proceedings was not given to the accused and the law did not provide for any appeal. The Supreme Court accepted each one of these contentions and held :

Neither the Fourteenth Amendment nor the Bill of Rights is for adults only. Under our Constitution, the condition of being a boy does not justify a Kangaroo court.⁴⁴

It is interesting to know a few things more about *Gault's case* to appreciate the reasons for the Supreme Court's concern for the offenders' position before the juvenile court. The penalty for violation of the Arizona law, which Gault was found guilty of, was a fine of \$ 5 to \$ 50 for an adult offender or an imprisonment of two months. The 15 year old boy was committed as "juvenile delinquent" by the judge to the State industrial school "for the period of his minority (six years) unless sooner discharged by due process of law". The judge defined "juvenile delinquent" as one who was habitually involved in immoral matters. The only evidence of any past immoral behaviour on the part of young Gault was a referral made two years earlier alleging that he had stolen a baseball glove and lied to the Police Department about it. No petition or hearing apparently resulted from this "referral".⁴⁵

The extremely highhanded action taken by the Arizona judge made it clear to many, including the justices of the Supreme Court, that the time had come to stop such abuses. Although the decision does not give to juveniles all of the protections accorded to adults charged with crimes, the disenchantment with the juvenile court was explicit and the trend of opinions predictable.⁴⁶

The Supreme Court, while deciding *Gault's case*, made some other observations questioning certain assumptions of juvenile court justice by quoting facts and figures regarding juvenile delinquency

44. *In re Gault*, 387 US 1 (1967).

45. Haskell & Yablonsky : CRIME AND DELINQUENCY, p. 235.

46. *Ibid.*

and concluded that non-observance of due procedure did not necessarily lead to better crime situation. The Court observed :

It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process standards. ...The observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes, for example, to such startling findings as that reported in an exceptionally reliable study of repeaters or recidivism conducted by the Standard Research Institute for the President's Commission on Crime in the District of Columbia.

The Court then quoted the President's Commission's Report :

In fiscal 1966 approximately 66 per cent of the 16 and 17 years old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1955, 56 per cent of those in the Receiving Home were repeaters. The SRI study revealed that 61 per cent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 per cent had been referred at least twice before. The Court, therefore, took the view that these figures could not lead to the conclusion that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions, was effective to reduce crime or rehabilitate offenders.

It is submitted that though the court was justifiably upset about the phenomenon that child offenders were not given some of the basic rights given to the adult offenders, their conclusion, on the basis of repeated delinquent activity by the child offenders shown by SRI study, that non-observance of constitutional safeguards did not reduce the crime was somewhat beside the relevant point. The question of giving the constitutional safeguards is significant in the proceedings for the determination whether the child has committed a delinquent act or not. Whether he would be reformed or not by the treatment given to him and whether he would violate the law again are questions which involve so many other dimensions rather than the issue of constitutional protections at the hearing. In fact the assertion that many offenders

had a second appearance before the juvenile court may appear to strengthen the impression that the finding of guilt was proper, constitutional considerations notwithstanding.

The lack of observance of constitutional safeguards in a juvenile court may, however, be relevant to the growth of delinquent behaviour in a different context which was also pointed out by the court. The Supreme Court quoted approvingly the sociologists, Wheeler and Cottrell:

When the procedural laxness of the *parens patriae* attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.⁴⁷

Another significant observation of the court was regarding the claim of the juvenile courts that notices of charge of the specific offences are not given to the offenders with the object of preventing the disclosure of their deviational behaviour. The court said that the claim of secrecy was mere rhetoric than reality. Disclosure of court records of the juvenile offenders to FBI was quite common and the police also have complete files of the offenders which are sometimes made available not only to the FBI and military organizations but also to the private employers.

Constitutional Position in India

The rights guaranteed to an accused person are nearly the same as in the American Constitution except that the right to trial by jury has not been given in India. Also, there is no provision corresponding to the right of speedy trial as given in the American Constitution. There is the right against self-incrimination, the right to have lawyer of one's choice and the right not to be deprived of life or liberty except according to procedure laid down by law.⁴⁸ The constitutional issues have not been raised in India till now because of the different nature of the juvenile courts in India and also due to some difference between the Indian and American Constitutions

47. JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL (Russel Sage Foundation, 1966), p. 33.

48. Articles 20, 21 and 22 of the Indian Constitution.

regarding the procedure to be employed for depriving a person of his life or personal liberty. In India, the juvenile courts are criminal courts unlike the U.S.A. and England where they are regarded as courts of a civil nature.⁴⁹ It was probably due to this reason that some safeguards have been provided to the juvenile offenders on the lines of adult offenders. A neglected child must be produced before the Welfare Board within 24 hours of his being taken charge of by a police officer.⁵⁰ The period of detention of a delinquent child in a reformatory school cannot exceed the maximum period of punishment provided for the offence.⁵¹ Under the Indian Constitution, what is required to deprive a person of his life or liberty is the procedure established by law. Any procedure laid down by law which does not violate any fundamental right is a valid procedure. Reasonable restrictions can be placed on the fundamental rights and the restrictions on the rights of juvenile offenders laid down in Children Acts are likely to be upheld by the Indian courts. Under 'due process' clause the American courts have a much wider latitude to declare special procedures as 'unconstitutional' as compared to their Indian counterparts.

The Juvenile Court Judge

The juvenile court being different from ordinary courts, the judges are expected to be of different outlook in view of the social-welfare function which is assumed to be the primary responsibility of children courts. For instance, it is laid down that no one shall be appointed a member of the Board or a magistrate in the Children Court unless the administrator is of the opinion that he has special knowledge of child psychology and child welfare.⁵² It is also laid down that there should be at least one woman magistrate in the Children Court and one woman member in the Child Welfare Board.⁵³ In U.S.A., a juvenile court judge should be :

- (i) deeply concerned about the rights of people
- (ii) keenly interested in the problems of children and families

49. 67 Punj LR 149.

50. Children Act, 1960, Section 13(3).

51. *Ibid.*, Section 22.

52. *Ibid.*, Section 6(3).

53. *Ibid.*, Sections 4 and 5.

- (iii) sufficiently aware of the contributions of modern psychology, psychiatry, and social work; that he can give due weight to the findings of these sciences and professions
- (iv) able to evaluate evidence and situations objectively, and make dispositions uninfluenced by his personal concepts of child care
- (v) eager to learn
- (vi) a good administrator
- (vii) able to conduct hearings in a kindly manner and to talk to children and adults sympathetically on their level of understanding without loss of the essential dignity of the court.⁵⁴

The guidelines laid down by the National Probation and Parole Association require that the juvenile court judge have a working knowledge of social case work, child psychology, the elements of psychiatry and the other behavioural sciences.

The lofty ideals, as mentioned above, are not achieved sometimes in actual practice. In the U.S.A. the juvenile court judges are either elected or appointed by the governors or mayors with or without the recommendations of the local bar associations. The governors and mayors appoint the persons selected for the job largely as a reward for political services rendered to them. A recent survey of juvenile court judges in the United States revealed that half of all juvenile court judges have no undergraduate degree; a fifth have received no college education at all, and a fifth are not members of the bar. Almost three-quarters devote less than a quarter of their time to juvenile and family matters, and judicial hearings often turn out to be little more than attenuated interviews lasting from ten to fifteen minutes.⁵⁵

54. U. S. Department of Health, Education, and Welfare, *STANDARDS FOR JUVENILE AND FAMILY COURTS*, pp. 103-4.

55. *THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE*, p. 80.

Disposal of the cases of Delinquent and Neglected Children

1. *Neglected Children*.—Neglected children can be dealt with in a number of ways depending upon the individual circumstances of the child. He may be sent to the care of a home run by the local authority or some institution which may be certified as a fit institution by the local authority. Thus the Child Welfare Board may order a child to be sent to a children's home created under Section 9 of the Act or any other certified institution.⁵⁶

Another mode of dealing with the child in appropriate cases is to give him in the custody of his parents or of any other person who may be considered fit for the purpose by the Child Welfare Board.⁵⁷

2. *Delinquent Children*.—Delinquent children may be dealt with in a number of ways depending upon the gravity of the situation. The lightest action may be to release the delinquent after advice or admonition and the extreme action may be an order for the custody of a child in Borstal or special school. In some situations, a more desirable technique is to release the offender on probation in the care of a parent, guardian or any other fit person. In fact the origin of the concept of probation in the penal philosophy lies in the special problems of juvenile offenders. The following orders may be passed by a Children Court under the Children Act of 1960 for dealing with the juvenile delinquents⁵⁸:

- (a) The child may be allowed to go home after advice or admonition.
- (b) The child may be released on probation under the care of any parent, guardian or other fit person on their executing a bond for well-being and good behaviour of the child for a period not exceeding three years.
- (c) The child may be sent to a special school⁵⁹ to remain there till he ceases to be a child or for a period of at least three years if the offender is a boy above 14 years or a girl above the age of 16 years.

56. Children Act, 1960, Section 15.

57. *Ibid.*, Section 16.

58. Section 21.

59. Created under Section 10 of the Act.

The Act also lays down that no sentence of death or imprisonment can be imposed on a delinquent.⁶⁰ Section 22 of the Act further provides that in case of a serious offence by a child above 14 years of age, he may not be sent to a special school if not in his or other children's interest. Such a child may be placed in safe custody elsewhere. The place and manner of detention is to be determined by the administrator of the Union Territory of Delhi. The section also lays down a very significant principle that the period of detention can in no case exceed the maximum period of imprisonment prescribed for the offence.

Section 33 of the Act provides the guidelines to the juvenile courts and the child welfare boards for making orders under the Act. According to it the factors to be considered are the age of the child, the circumstances in which the child is living, the report made by the probation officer and the religious persuasion of the child. In order to ensure that such factors do not bias the court regarding the issue of guilt of the child, it is also provided that in case of a delinquent child the above considerations are to be made only after the issue of guilt has been decided.

It may be helpful at this stage to have some idea regarding the use of the various techniques discussed above with the available statistics. In these figures not only juvenile offenders but also youthful offenders upto the age of 21 are also included.

In 1971, in all 83,548 juvenile and youthful offenders were sent to the courts. Out of these 30.5% cases were pending for final disposal at the end of the year. 36.9% of juveniles sent to court were either acquitted or otherwise disposed of. Imprisonment was given to 19.9% of the total juvenile and youthful offenders. 3.7% of juveniles were sent to reformatory schools or other institutions and 5.8% were restored to the guardians.⁶¹ In other words, out of the total number of cases decided, only 5.3% of juvenile offenders were sent to reformatory schools and 7.4% were restored to the guardians.

The relevant statistics are furnished in the following table :

60. The question of death sentence probably does not arise since the court does not have jurisdiction in offences punishable with death. See Section 27 of Cr. P.C., 1973.

61. CRIME IN INDIA, 1971, p. 57.

TABLE

S. No.	States/Union territories	Juveniles sent to court	Restored to Guardians	On Probation	Sent to Reformatories and Borstals	Sent to Schools/Institutions	Sent to Adult Institutions	Imprisoned	Acquitted or otherwise disposed of	Pending disposal
1	2	3	4	5	6	7	8	9	10	11
1.	Andhra Pradesh	1419	419	108	44	143	8	120	347	230
2.	Assam	1607	5	43	...	...	...	289	349	921
3.	Bihar	1861	64	70	6	3	25	124	382	1187
4.	Gujarat	21419	48	70	3	142	342	2413	15128	3273
5.	Haryana	1543	443	32	...	...	...	294	89	685
6.	Himachal	488	1	14	...	...	...	46	198	229
7.	Jammu & Kashmir	367	2	...	...	...	...	155	172	38
8.	Kerala	266	15	26	15	16	...	4	104	86
9.	Madhya Pradesh	11321	594	163	90	986	145	2195	3365	3783
10.	Maharashtra	23103	1592	24	76	166	166	5490	5957	9632

1	2	3	4	5	6	7	8	9	10	11
11.	Manipur	60	...	2	...	...	...	6	3	49
12.	Mysore	4774	164	115	200	77	10	3007	668	533
13.	Nagaland	71	...	10	...	...	...	22	31	8
14.	Orissa	690	18	196	2	2	9	250	66	147
15.	Punjab	778	5	40	2	5	...	528	68	130
16.	Rajasthan	2346	37	162	40	7	2	77	392	1629
17.	Tamil Nadu	2529	630	323	227	253	25	118	745	208
18.	Tripura	...	...	...	...	...	...	...	...	...
19.	Uttar Pradesh	1703	181	344	105	57	3	151	303	559
20.	West Bengal	2660	6	38	97	1	...	105	1601	812
21.	A. N. Islands	177	...	...	...	...	...	...	43	134
22.	Chandigarh	163	...	4	...	...	...	15	110	34
23.	Dadra & N. Haveli	15	...	...	...	...	...	1	1	13
24.	Delhi	3444	592	...	5	...	477	838	387	1145
25.	Goa, Daman & Diu	22	...	3	...	1	...	7	...	11
26.	Laccadive Islands	...	...	...	...	...	...	...	...	...
27.	Pondicherry	722	...	9	7	1	...	...	278	17
TOTAL		83,548	4,816	1,796	919	1,860	1,212	16,665	30,787	25,493

From the above figures it appears that juvenile court philosophy has been applied best in States like Andhra and Tamil Nadu while Gujarat and Maharashtra seem to be at the other end.

The figures in the above table show that except in States like Andhra, Haryana and Tamil Nadu, where about 25% delinquents were restored to the parents,⁶² removal of the juvenile from the family is widespread in some form or the other. Removal from home has rightly been regarded as the most drastic measure among the modes of disposal of offenders by a juvenile court since it involves not only the personality of the offender but may give rise to mental torture to the family as well. This is particularly tragic in a case where the family is less to blame for the delinquency than the associates of the child. Nigel Walker, therefore, suggests that the child should not be removed from the family except when it becomes very necessary as in the following circumstances :

- (i) Cases in which the juvenile seems to be beyond parental control ;
- (ii) Cases in which removal seems necessary for the safety or welfare of others ;
- (iii) Cases in which the behaviour seems to be the result of mental disorder of a nature or degree which justifies in-patient treatment or care.

It is in this context of severity of consequences in the form of child's removal from the family that Nigel Walker justifiably questions the justness of the laxity in the evidence rules of the juvenile courts by making the observation :

It must be admitted that the care with which a man is tried should be related to the most drastic penalty that can be imposed on him if he is convicted, rather than the most probable penalty. . .⁶³

As regards the working of probation in case of juvenile offenders under the Children Act, the following table for the year 1964-68 can give some idea as to in what manner the supervision came

62. SENTENCING IN A RATIONAL SOCIETY, 1969, p. 185.

63. *Ibid.*, p. 182.

to an end, whether by good behaviour, on appeal, or by the expiry of the term of probation.⁶⁴

S. No.	State/Union Territory	By good behaviour	By court on appeal	On expiry of supervision
1.	Andhra Pradesh	1	13	2026
2.	Gujarat	1	12	240
3.	Kerala	—	—	407
4.	Maharashtra	65	1	1213
5.	Mysore	17	15	236
6.	Punjab	—	12	—
7.	Rajasthan	—	1	—
8.	Tamil Nadu	2	1	3869
9.	Delhi	3	6	204
10.	Tripura	—	—	—
Total		89	61	8195

The break-up shows that except in Maharashtra, the premature termination of supervision was rare. Court interference by way of appellate orders is also not very common. Most of the periods of probation came to their scheduled end.

The following table provides the information regarding the revocation of probation order due to violation of conditions of probation order or by commission of fresh crime by the juvenile offenders for the same period (1964-68).

S. No.	State/Union Territory	Probation revoked (by violation of conditions)	Probation revoked (by commission of fresh crime)
1.	Andhra Pradesh	35	112
2.	Gujarat	—	—
3.	Kerala	25	14
4.	Maharashtra	69	32
5.	Mysore	40	3
6.	Tamil Nadu	42	71
7.	Delhi	28	14
Total		239	246

64. Based on PROBATION AND PRISONS: A STATISTICAL ANALYSIS, Central Bureau of Correctional Services, 1964-68, pp. 16-17.

The above figures show that most of the juvenile offenders completed their supervision period satisfactorily according to their probation officers and it was only in 6.2% cases that the order of probation had to be revoked.

Attendance Centres

Apart from the techniques employed to deal with children by the juvenile courts discussed above, there is one more which is used in England and some other countries. It requires the juvenile delinquents to spend their leisure period at prescribed places known as attendance centres. Attendance centres are a post-war innovation intended to vindicate the law by imposing loss of leisure, a punishment that is generally understood by children to bring the offender for a period under discipline and, by teaching him something about the constructive use of leisure time, to instruct him on leaving the centre to continue organised recreational activity by joining youth clubs or other organisations.⁶⁵ The loss of leisure is imposed on the delinquents by making it obligatory for him to present himself on fixed days at certain hours, generally for two hours on consecutive Saturdays, to participate in physical exercises and handicrafts under the supervision of a police officer. The philosophy of attendance centre has been derived from the researches of some criminologists who found a correlation between the leisure available to a child and his delinquent behaviour. In a study of 501 problem children in foster families, Healy, Bronner and two others came to the conclusion that nothing in the treatment of delinquency is so effective as the development of substituting activities and interests.

According to Sullenger, more than 90% of delinquent acts are committed during leisure time.⁶⁶ Cyril Burt expressed the same sentiment when he observed that most of the juvenile offences were committed in the afternoon when the delinquents have more leisure.⁶⁷

In its report on juvenile delinquency (1956) the Bombay Child Welfare Society disclosed that in Bombay city 15% of the

65. INGLEBY REPORT 1960 : quoted by Nigel Walker in "CRIME AND PUNISHMENT IN BRITAIN", p. 187.

66. SOCIAL DETERMINANTS IN JUVENILE DELINQUENCY, 1936.

67. THE YOUNG DELINQUENT, 1938, p. 160.

juvenile offences were committed before 11 a.m., 50% between 11 a.m. and 4 p.m. and 35% after 4 p.m. but before 7 p.m.

Form the above studies it may not be very accurate to infer that offences during certain hours are directly attributable to the leisure available to children at that time. Maybe that the victims of the delinquent acts also have more leisure around those very hours giving better opportunity to the offenders by being away from homes or similarly occupied. Nevertheless the fact remains that there is a lot of robust commonsense regarding the relationship between leisure and delinquency since an idle man's mind is rightly regarded as a devil's workshop.

Evaluation of Juvenile Courts

The juvenile courts won instant applause for their lofty philosophy and high ideals when they were created for the first time around the beginning of the present century. It is only in the recent past that questions regarding the validity of certain assumptions of the philosophy have been raised and some sort of disenchantment and pessimism has arisen out of the actual working of the juvenile courts. Attacks have mounted both from the advocates of the interests of the juvenile offenders as well as from those for the protection of the society. The issues relating to constitutional and legal safeguards have already been discussed and attention may now be focussed on certain other aspects of the problem.

Apart from the shortcomings which the juvenile courts really suffer from, their difficulty is also enhanced by the fact that the initial optimism in the juvenile courts generated hopes which were too ambitious to be fulfilled. The ideal which was set is best expressed by Judge Julian Mack in the following words :

To find out what the child is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift not to crush but to develop, not to make him a criminal but a worthy citizen.⁶⁸

68. Mack : *The Juvenile Court*, 23 Harvard Law Review (1909).

To find out 'what the child is' and 'to uplift and develop him', not only are vast resources in terms of money and human material needed, which are not always forthcoming, but the reliability and efficacy of the various measures adopted for the rehabilitative ideal are themselves of a doubtful nature. As observed by the American Commission in its report, though there is no shortage of theories of the etiology of delinquency, experts in the field agree that it is extremely difficult to develop successful methods for preventing serious delinquent acts through rehabilitative programmes for the child.⁶⁹

Though adequacy of resources is not the only factor, it is an important dimension in the problem faced by the juvenile courts. In countries like India the resources may just not be available while in countries like the U. S. A. there may be resistance on the part of the community in view of the skepticism regarding the juvenile court philosophy and working of the juvenile courts and a feeling that the rehabilitative ideal has been pursued a bit too far. Eminent personalities like Dean Francis Allen have recommended the role to be played by the juvenile courts in the following words :

In a great many cases the juvenile court must perform functions essentially similar to those exercised by any court adjudicating cases of persons charged with dangerous and disturbing behaviour. It must reassert the norms and standards of the community when confronted by seriously deviant conduct and it must protect the security of the community by such measures as it has at its disposal, even though the available means may be unsatisfactory, when viewed either from the standpoint of the community interest or of the welfare of the delinquent child.⁷⁰

The President's Commission noted the consequences of the lack of resources on the quality and status of juvenile court judges and the availability of trained personnel and other facilities to the court. The Commission observed :

In few jurisdictions, for example, does the juvenile court judgeship enjoy high status in the eyes of the bar, and while there are many juvenile court judges of outstanding ability and devotion, many are not. One crucial presupposition of the juvenile court philosophy—a mature and sophisticated judge, wise and well-versed in law and the science of

69. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT : JUVENILE DELINQUENCY, pp. 7-9 (1967).

70. THE BORDERLAND OF CRIMINAL JUSTICE, p. 53.

human behaviour—has proved in fact too often unattainable . . . Other resources are equally lacking. The survey of juvenile court judges reveals the scarcity of psychologists and psychiatrists—over half a century after the juvenile court movement set out to achieve the coordinated application of the behavioural and social sciences to the misbehaving child. Where clinics exist, their waiting lists usually are months long and frequently they provide no treatment but only diagnosis. And treatment, even when prescribed, is often impossible to carry out because of the unavailability of adequate individual and family case-work, foster home placement, treatment in youth institutions.

Summing up, the Commission observed that in theory the juvenile court was to be helpful and rehabilitative rather than punitive but in fact the distinction often disappeared, not always only because of the limits of knowledge and technique. In theory, the courts' action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal. In theory the court is to treat children guilty of criminal acts in non-criminal ways but in fact it labels truants and runaways as junior criminals.

Finally the Commission quoted Mr. Justice Fortas, speaking for the Supreme Court in *Kent v. United States*⁷¹:

There may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

The Commission concluded by saying that though rehabilitation of child offenders should be the primary aim of juvenile courts, rehabilitation should not be the exclusive preoccupation of the court since it has to protect the community from threatening conduct, like any court of law.

Probably it was due to the unsatisfactory working of the juvenile courts because of the various problems cited above that in England a white paper was issued in 1965 which provided for the creation of family courts in place of the present juvenile courts. It also sought to reduce the age of non-criminal proceedings from 17 years to 16 years. The recommendations, however, proved to be quite unpopular and the juvenile courts are retained in England

71. 383 US 541, 556 (1966).

to this day and the age of non-criminal proceedings also remains at 17 years.

PREVENTION OF JUVENILE DELINQUENCY

Prevention of juvenile delinquency like the prevention of any other phenomenon of unpleasant and destructive nature is obviously much better than its subsequent control after occurrence. Prevention of crime or delinquency can be achieved in a number of ways and contents. When an offender is sent behind the bars or is given capital punishment, he is prevented from committing further crimes during the period of his incarceration or forever, as the case may be. In fact the idea inherent in any form of punishment is to prevent the commission of crimes by the actual as well as the potential offenders. Prevention in the present context, however, is used by the criminologists in a limited sense *i.e.* forestalling the criminal behaviour by taking advance action in terms of individual and environmental adjustments. In other words, prevention in this sense includes the efforts to improve family relationships, better adjustments in school, provision of education and recreation designed to produce useful and upright citizens and the use of aids in the fields of social work, medicine and psychiatry. It is evident that these programmes can be implemented in societies which are at least reasonably affluent. In countries like India, afflicted with mass poverty, the limitations of preventive programmes experienced elsewhere are bound to manifest themselves more severely.

It follows from the concept of crime prevention, as explained above, that the programmes for the prevention of crime and delinquency are to be directed not only to those who have already indulged in criminal behaviour sufficient enough to warrant cognizance by law enforcement authorities but also those who either have manifested some tendency to suggest possible delinquency in future or who may be otherwise normal but criminal or delinquent behavior can be expected from them due to individual or environmental factors operating against them. Though the preventive programmes do not pertain exclusively to the juvenile delinquents, they are obviously more relevant and useful in the context of young persons in view of the fact that the chances of a person turning criminal after reaching a certain

age, when the values and attitudes are more or less fixed, are somewhat lower than in the case of persons of immature age and understanding.

Identification of Potential Delinquency

The timely identification of potential delinquents is implicit in the concept of crime prevention. Efforts have been made by some criminologists to devise methods for predicting delinquency in appropriate cases. The most notable contribution in the area of early delinquency prediction is that of Sheldon and Eleanor Glueck. By employing actuarial methods, the Gluecks found that the quality of a particular set of circumstances made it possible to differentiate between future delinquents and non-delinquents. The circumstances considered by them were: discipline and supervision of a boy by his father and mother, affection of father and mother for the boy and cohesiveness of the family.

Prediction tables as developed by the Gluecks and also by others, however, cannot be very reliable. While the tables developed by the Gluecks have resulted in overprediction, some other tables suffer from underprediction. While underprediction of future delinquency means that many cases of future delinquency would go unnoticed and, therefore, unattended, the difficulty in overprediction is that even cases where there are no chances of future delinquency would be subjected to preventive measures—a contingency which has been questioned both on practical as well as moral considerations.

Kinds of Programmes

The prevention programmes may take one of the two forms *viz.* programmes focussing on an individual and the programmes having an environmental orientation. The former involves the prevention of delinquency through counselling, psychotherapy and proper education while the latter approach employs techniques with a view to changing the socio-economic context likely to promote delinquency. These two forms of preventive approach are reflected in the following strategies which are adopted in crime prevention programmes.

Psychiatric Clinics

The object of psychiatric aids through psychiatrists, clinical

psychologists and psychiatric social workers is to help the potential delinquents by understanding their personality problems and, thereafter, treating and counselling them at appropriate times. Taft and England have listed the functions of the clinics as follows⁷²:

- (i) To participate in the discovery of "pre-delinquents".
- (ii) To investigate cases selected for study and treatment.
- (iii) To treat cases itself or to refer cases to other agencies for treatment.
- (iv) To interest other agencies in the psychiatrically oriented types of treatment of behaviour disorders in children.
- (v) To reveal to the community unmet needs of types of children.
- (vi) In some communities, to engage in behaviour research.
- (vii) To cooperate in the training of students intending to specialize in the treatment of behaviour problems.

The psychiatry oriented sciences and services suffer due to serious handicaps even in extremely advanced countries like the U. S. A. George Albee has the following comments to make⁷³:

These clinics are treating the wrong people; they are using the wrong methods; they are located in the wrong places; they are improperly staffed and administered.

The availability and scope of the psychiatric services in countries like India can be well imagined.⁷⁴

The question as to whether the child guidance clinics are successful or not is difficult to answer, since the concept of 'success' itself is both and subjective and relative. The perception of 'success' has been found to be different, as can be expected, from the angle of the children themselves, the policemen, parents,

72. Op. cit, p. 524.

73. George W. Albee: *A Spectre is Haunting the Outpatient Clinic*, in Alan B. Tulipan and Saul Feldman (eds.): *PSYCHIATRIC CLINICS IN TRANSITION*, (1969), pp. 1-24.

74. According to a report in the *Times of India* of July 20, 1976, there are in all not more than 500 trained psychiatrists in India.

teachers and foster parents. Taft and England raise some pertinent questions⁷⁵:

It is difficult to evaluate the child guidance clinic as a crime prevention agency. Shall we judge it in terms of its success with the juvenile recidivist, or shall we hold that its role is with relatively simple and earliest beginnings of behaviour problems? Shall we measure its success as of the date when it ceased treatment, and if so shall we consider cases dealt with for the minimum or for the maximum periods? Or shall we expect the "cure" to last into the future after the clinic has ceased to function? What, again, shall be the test of success? Must angelic, or average, or only slightly improved behaviour define a successful case?

Educational Programmes

Unlike India, the impact of the educational institutions is very significant in countries where almost every child goes to school and, preventive programmes can, therefore, be launched in an effective manner through the schools. Three goals of school education have been suggested in this context.⁷⁶

- (a) Developing a new value system in which the school would be a force working against the discrimination and rejection experienced by pupils drawn from the lower classes.
- (b) Making the schools an instrument for fostering work attitudes, self-esteem, and job skills to improve the employability of graduates of schools in deprived areas.
- (c) Providing school experiences designed to improve the self-image of delinquency-prone children.

Recreational Programmes

There is a popular belief that recreational programmes are a good check on delinquency since idleness provides a fertile ground for many evils. It is believed that the energies of youth can be very well channelized into pursuits like sports, games, and other healthy activities which would counteract delinquent propensities among the participants.

75. Op. cit, p. 525.

76. William E. Amos, "Prevention through the Schools", in *DELINQUENCY PREVENTION: THEORY AND PRACTICE*, pp. 132-35.

The popular belief regarding the efficacy of recreational programmes has not, however, found support in a number of studies. In 1957, a sub-committee of the U. S. Senate reported⁷⁷ :

(1) Being a good athlete is no deterrent at all to delinquency ; (2) experience in team-play through recreation can have no significant amount of carry-over to general character traits or conduct patterns ; (3) even highly organized recreational activities do not absorb enough of the energy or time of the child to at least appreciably decrease his opportunities to engage in delinquency ; (4) in fact, a play group may itself help to stimulate its members to illegal activities engaged in for fun after the games are over. The probability of this is increased when there are delinquent or near delinquent members in the group ; (5) many of the recreational programmes do not in any event reach those children who are presumed to need them most because of their problems of health or delinquency ; (6) if a child is disposed towards law violation because of the influences of the family and neighbourhood, his early training, his personality distortions or his attitudes towards an authority, it will require much more than games and sports to do anything effective about it ; (7) where children have come to enjoy their delinquencies as games, so commonly the case, the thrills thus provided are usually greater than those which organized recreation can provide.

It is clear from the above report that not only do the programmes lack reaching power and crime prevention efficacy, they may in fact promote delinquency sometimes.

Community Programmes

The strategies discussed above are mainly directed to individuals with a view to eliminating the factors responsible for their social maladjustments. Besides these there are programmes involving community and group participation where efforts are made in terms of the environmental factors. The basic strategy of such programmes is to reach the people in need of help instead of the people approaching the workers and agencies. Another significance of such programmes is that the participation of the local community is considered to be more important and the role of professional leadership is sought to be kept at the minimum level.

77. "Juvenile Delinquency" Report of the Committee on the Judiciary (Washington, U. S. Senate, 85th Congress, First Session, 1957), quoted in Walter C. Reckless, *op. cit.* p. 777.

Marshall B. Clinard has outlined the key assumptions of these programmes as follows⁷⁸ :

- (i) local people will participate in efforts to change neighbourhood conditions,
- (ii) because they do not accept an adverse social and physical environment as natural and inevitable, and
- (iii) because self-imposed changes in the immediate environment will have real significance to the residents and consequently will have more permanent effect.

The Chicago Area Project and detached workers programmes in the U. S. A. are among the most notable programmes based on these premises.

Functioning since 1934, the Chicago Area Project is one of the oldest community programmes in the U. S. A. Clifford R. Shaw founded this project conceiving that the role of the local leadership of high delinquency areas could be more useful than of the professionally trained workers. The advantages available to the local leadership are that they are more familiar with the area conditions and have better communication with the residents. Moreover they have greater involvement in the local problems and can be more efficacious in finding the required financial resources.

The distinguishing feature of detached worker programmes is that though the workers may be associated with social agencies, they do not work within the agency walls. The workers try to reach the 'street-corner gangs' in order to provide assistance and guidance to the members of the gang. These programmes were launched when the experts on delinquency found recreational programmes to be inadequate for dealing with delinquents. The function of the worker in these programmes is to act as an adult friend for moulding their values in order to make their behaviour socially acceptable. The mechanism of the change in values is explained by Dr. Walter B. Miller thus⁷⁹ :

The process of inducing changes in the value configuration of the group is predicted on the existence of substantial

78. Quoted in Elmer Hubert Johnson: *CRIME, CORRECTION AND SOCIETY*, (1974) p. 553.

79. Walter B. Miller: "*Preventive Work With Street-Corner Groups: Boston Delinquency Project*", *The Annals of the American Academy of Political Science*, Vol. 322 (March, 1959) pp. 98-106, quoted in Reckless, *op. cit.* p. 787.

support for the maintenance of law-abiding behaviour within the value system of the lower-class community itself. Hence, shifting the groups' values from an emphasis on law-violating behaviour as a basis of prestige to an emphasis on law-abiding behaviour entails increasing the availability of law-abiding avenues to valued ends already present in the groups' own cultural milieu. The method thus aims to affect individual behaviour by altering the value configuration of the group that exerts most immediate influence on external behaviour.

According to Dr. Miller, the corner-group method of inducing behaviour change in adolescent groups has an excellent potential for controlling delinquency during the years of adolescence.

THERAPEUTIC APPROACH—EVALUATION

In this and the last two chapters, the rationale and techniques of the rehabilitative ideal as manifested in prison reform, probation, parole and juvenile courts have been examined. The criticism against the juvenile court and its procedure having been noted already, the evaluation of rehabilitative philosophy in action may now be made. Obviously, no one can seriously object to the rehabilitative ideal as such, but what has been debated is whether it is really possible to reform a criminal and if so whether it is worthwhile to attempt it in view of the knowledge and skill available, the repercussions on the law-abiding citizens and having regard to the interests of the offenders to be reformed and rehabilitated.

Regarding the efficacy of therapeutic techniques it has been said that human beings are not putty that can be remoulded at will by benevolent intentions. The role of education and religion has been questioned in reforming offenders since a fair number of them do have good education and schooling and are fairly religious before getting committed to corrective institutions. The records of juvenile offenders show that even the reformation of young offenders is not always possible. The reformists present the analogy of criminal law's possible efficacy to deal with offenders to the use of medicine in case of patients. The analogy is quite attractive and appealing but it breaks down when it is considered that the surgeon can determine with a fair degree of accuracy the cause of the distress and remove it, as an inflamed appendix or cancerous growth, which is not possible in a complex social system for a social physician to do. He cannot find out any cause

of criminalisation even with a fair amount of certainty and remove it from the personality of the offender or from his social surroundings.⁸⁰

Considering the cost involved in the rehabilitative programmes, Cohen observes :

Suppose that fiendish perpetrators of horrible crimes on children could be reformed by being sent first for several years to a special hospital. Will people vote large funds for such purposes when honest law-abiding citizens so often cannot get adequate hospital facilities? Suppose that we find that a certain social environment or that an elaborate college course will reform a burglar or a gunman, would our community stand for the expense when so many worthy young people cannot afford to go to college because they have to go to work? We certainly should not give even the appearance of reward for criminality. Let us not forget that there is always a natural resentment in any society against those who have attacked it. . . .⁸¹

There is a more basic argument against rehabilitative techniques that they are incompatible with the reformatory objectives in the sense that curtailment of liberty, in any form, or with any motivation is bound to produce a reaction in the mind of the criminal which may not be conducive to the reformatory ideal. It was asserted long ago by Garofalo that the mere deprivation of liberty, however benign the administration of the place of confinement, is undesirably punishment. Whether it is the correctional programme in a prison or in probation or parole, the element of authoritarianism may provide the offender with new rationalizations for continued deviant behaviour.

According to Dean Francis Allen, the rehabilitative ideal has adversely affected certain basic legal interests and values.⁸² One casualty which he points out is the idea of deterrence, many modern criminologists being hostile to it. He asserts that criminal law has a general preventive function to perform in the interests of public order and of security of life and limb, and the influence of criminal sanctions on the millions who never engage in serious criminality is of greater social importance than their impact on the hundreds of thousands who do commit criminal acts.

80. Cohen : *Moral Aspects of Criminal Law*, 49 Yale Law Journal 987, at pp. 1012-1014.

81. Ibid.

82. THE BORDERLAND OF CRIMINAL JUSTICE, pp. 25-41.

Another very serious charge against rehabilitative techniques, as already dealt with in the context of juvenile courts, is the greater loss of individual liberty involved in the supposed rehabilitative programmes than probably under the ordinary process of law. Allen gives an extremely unfortunate example in the following words :

Some time ago we encountered a man in his eighties incarcerated in a State institution. He had been confined for some thirty years under a statute calling for the automatic commitment of defendants acquitted on grounds of insanity in criminal trials. It was generally agreed by the institution's personnel that he was not then psychotic and probably had never been psychotic. The fact seemed to be that he had killed his wife while drunk. An elderly sister of the old man was able and willing to provide him with a home, and he was understandably eager to leave the institution. When we asked the director of the institution why the old man was not released, he gave two significant answers. In the first place he said, the statute requires one to find that this inmate is no longer a danger to the community; this I cannot do, for he may kill again. And of course the director was right. However unlikely commission of homicide by such a man in his eighties might appear, the director could not be certain. But, as far as that goes, he could not be certain also about himself or about you or me. The second answer was equally interesting. The old man, he said, is better off here. To understand the full significance of this reply it is necessary to know something about the place of confinement. Although called a hospital, it was in fact a prison, and not at all a progressive prison. Nothing worthy of the name of therapy was provided and very little even by way of recreational facilities.

In the words of Allen, perhaps the case reflects that arrogance and insensitivity to human values to which men who have no reason to doubt their own motives appear peculiarly susceptible.⁸³

Finally the attack on the present rehabilitative programmes has come even from those who favour such programmes. It is on the ground of inadequacy of the resources available for rehabilitative techniques and the archaic nature of the legal system despite the introduction of new penology into it. In his well-known article, *The New Penology: Fact or Fiction?* Alfred C. Schnur came to the conclusion, after making various calculations on the basis of statistics in the U.S.A., that there is not more than 82

83. Francis Allen : *BORDERLAND OF CRIMINAL JUSTICE*.

seconds of psychiatric help available for each inmate during a whole month. He observed :

It is appalling to realize that the average prisoner will have had about 30 hours of treatment time allocated to him during the time that he was withdrawn from society to make him safe for return to society. One cannot avoid concluding from this that such rehabilitation as does occur must be largely the consequence of prisoners' do-it-yourself projects. It should come as no surprise that so many men return to crime following such "lavish" treatment programmes. It is, indeed, remarkable that there are not more recidivists.

The question posed by the title of the paper, *The New Penology—Fact or Fiction?*⁸⁵ is answered by Schnur in these words: "I don't know. It has not been tried."⁸⁴ Probably the greatest handicap of the therapeutic approach lies in the fact asserted by Schnur that it has not really been tried so far and hence it is difficult to make a reasonable assessment of its potentialities.

85. Journal of Criminal Law, Criminology and Police Science, XLIX (November—December, 1958).

Chapter VIII

THE POLICE

The ideal purpose of police in a community can be best described in the following words which spell out the duties of law enforcement officers as laid down in the International Code of Enforcement Ethics :

(As a law enforcement officer, my fundamental duty is to serve mankind ; to safeguard lives and property ; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence and disorder ; and to respect constitutional rights of all man to liberty, equality and justice.)

But paradoxical as it may sound, it is a universal phenomenon that the police have been criticized and condemned for committing acts which are just contrary to the cherished ideal expressed in the above words. The basic cause of such an unfortunate situation is that the powers, which are given to the police to fulfil their legitimate and essential functions, are capable of being abused by them to torture mankind, to destroy lives and property, to oppress and intimidate the weak and to trample the constitutional rights of the community as well. Whether policemen are solely to blame for the notoriety they have earned, whether their misdeeds have been exaggerated, are questions which involve the consideration of a number of issues regarding the functions of the police, the social milieu in which they live and work, the quality and number of persons and other resources available to the police forces and the various constitutional and legal limitations within which they have to operate to produce the desired results.

Functions of the Police

The traditional functions of the police, which remains the most important even today, is to deal with the criminal in action.

This function requires detection and investigation of crime, arrest of the offenders and the collection of evidence against those who are prosecuted in the courts of law.

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Another purpose of the police force is to effect prevention of crime. Traditionally this function involves patrolling by the police and preventive action against potential wrongdoers under the vagrancy laws. In a more modern context, the prevention of crime by the police includes the detection of juvenile delinquency and the reference of suitable cases to the juvenile courts and other correctional agencies.

The third function of the police is owing to the growth of the contemporary period involving the enforcement of a wide variety of regulations which are not concerned directly with the criminal: direction of automobile traffic, enforcement of sanitation and licencing regulations, control of crowds, action against obscene literature and films, civilian defence; and disaster duty.

The police in India has to perform all the functions enumerated above as in the other countries, but their burden is exceptionally heavy due to the peculiarities of the socio-economic life of the community, heterogenous nature of the population and the existence of almost all the political philosophies. To quote R. Prabhakar Rao, a police officer from Andhra Pradesh :

In fact one can say that for the variety of law and order problems, few countries can compete with ours. Every conceivable type of conflict in society is possible in our country due to its widely diverse sociological groups. Political elements of every conceivable shade from extreme conservatives to the Maoist reds, religions, castes, communities, sects, subsects by their hundreds and glaring economic disparities, all go to make a fertile breeding ground for conflicts. Instances are not wanting when an injured cow or a slogan on a mosque or disfiguring of an unworshipped idol have led to large scale clashes. Similarly quarrels at water taps or common wells, or at cinema queues have sometimes developed into major conflagrations. A traffic accident, an objectionable scene in a cinema, quarrel between a student and a bus conductor have proved sufficient bases to build up mass violence resulting in looting or damaging public and private property, and assaults on innocent persons. The rise of senas and local organisations with avowed intention of playing up feelings of citizens on local

issues projecting them completely out of focus has been a disturbing feature. Goonda elements with their vote-catching power have been becoming more and more active. We also see the gradual deterioration of the 'politics of opposition and politics of agitation' into 'politics of mass violence'. Hartals bandhs, gheraos, self-immolations, holding up of trains have become daily features in some part or other of the country.¹

Prof. H. Bailey makes a similar observation in the following words :

Crime in India is bewildering in its variety ; the police must cope with a range of crime as diverse as any in the world. While people are vicious to one another in India in much the same ways that they are in the West, what distinguishes the Indian scene is the enormous variety of circumstances within which crime becomes manifest. It is the richness of social and geographical conditions that gives to Indian crime its incredible and fascinating heterogeneity. Only in a country which, as someone has remarked is advancing in uneven stages from the first to the twentieth centuries could one have cattle thievery and insurance frauds, dacoity and stock swindles, murders for witchcraft and vehicular homicide.²

How far is the police in India capable and adequate to meet such a stupendous challenge? What are the various obstacles which the police faces while discharging its functions? To answer these and other related questions, let us first understand the present structure of the Indian police with reference to its roots in the past since many of the present day problems may be understood better in the historical perspective.

Development of Police Organization in India

Police force, of some kind or the other, has always been present in all civilized societies from times immemorial. In India also the police organization in various forms dates back to very ancient times. Even in old epics like Ramayana and Mahabharata there are references to the existence of police organizations. Manu, the great lawgiver of India, dealt with the

1. POLICE IN A DEVELOPING SOCIETY, Osmania University Publication, 1972, p. 99.
2. THE POLICE AND POLITICAL DEVELOPMENT IN INDIA, 1969, Princeton University Press, p. 106.

subject of police at length and recommended that the police administration should be entrusted to those persons only who had knowledge of local people and the region for the efficient enforcement of law and order, a proposition held to be valid even in the contemporary period. In India, throughout the recorded history, there have been two distinct police systems for rural and urban areas. The duality was there during the periods of Maurya Gupta and Mogul empires and persists to some extent, even today. The imperial powers did not assume the direct responsibility of maintaining law and order for the rural areas. It was left to be taken care of by the local dominant landowner or the village headmen who were accountable, in theory, to the subordinate officers of the empire who did not exercise their authority to interfere very often.

The imperial governments maintained a more elaborate police system in the cities and towns where a *Kotwal* used to be the head of the police administration. Although the post may date back to Mauryan times, the clearest description of its activities comes from Moghul sources, especially the *Ain-i-Akbari*. The kotwal was to raise and maintain a police force, to regulate night patrolling, to maintain surveillance over visitors, spies, and migrants, to arrest criminals, to keep the prisons, and to eliminate prostitution and consumption of alcoholic beverages. The position was coveted by many, particularly for the opportunities it provided for extortion and receiving bribes. The kotwal is usually pictured as being ruthless, cruel, arbitrary, and effective when it was in his interest to be.³ But there was nothing unusual in the kotwal's being oppressive, ruthless or arbitrary since the police in India has always been credited with like qualities. Commenting on the eighteenth century police situation, the Police Commission of 1902-1903 observed :

Extortion and oppression flourished unchecked through all gradations of officials responsible for the maintenance of law and order.⁴

The East India Company started its commercial activities in India in the year 1906 and found themselves wielding political

3. Bailey, op. cit., pp. 38-39.

4. Government of India, Report of the Indian Police Commission 1902-1903, p. 5.

power by the middle of the next century over a substantial territory, particularly in the Presidencies of Calcutta, Bombay and Madras. The company did not touch the existing police system upto 1792 when Lord Cornwallis, for the first time, took police administration out of the hands of the large landowners and introduced a new police force responsible to the company. Under the new scheme, the post of *darogha* was created in every district. Daroghas were made responsible to the district judges and it was their responsibility to supervise the village landowners and headmen policing the villages. Prof. Bailey quotes John Beames⁵ to give a graphic account of the personality and power of the darogha :

They ruled their territories like little kings. Their misdeeds were legion and always went unpunished, for who would have the temerity to report him to the Collector. The darogha's powers of harassment were enormous ; he could have a person indicted for harbouring a bad character or failing to assist an officer in arresting a criminal. Obtaining witnesses presented no problem to the darogha. They were close to the people and were themselves wily and unscrupulous enough to meet the criminal on his own ground.

Beames is also quoted to have credited the daroghas with being splendid detectives.

The darogha system failed to deliver the goods, in particular they failed to supervise the village police and the scheme was eventually abrogated in the three Presidencies in 1814 when the traditional village police system was reintroduced. In the new system, the Collectors through their subordinates became responsible for the law and order problem in their districts. The darogha was, however, found indispensable in Bengal and continued to survive the onslaughts of the scheme of 1814. Despite the abolition of the darogha system, the situation continued to be chaotic as reflected in increased crimes like dacoity and overall insecurity.

The opportunity for reformation was provided by the conquest of Sind by Sir Charles Napier in 1843. Sind had neither the revenue system headed by the Collectors in the districts nor the

5. John Beames: MEMOIRS OF A BENGAL CIVILIAN (London: Chatto and Windus, 1961), pp. 140-141.

village police system prevalent in other territories controlled by the East India Company and Napier had, therefore, an absolutely clean slate in Sind to create a police organisation on a new pattern. He used as model the Royal Irish Constabulary. Napier created a separate police organization directed by its own officers. The direction of the police force was in the hands of an inspector-general of police throughout the provincial territory; it was with the superintendent of police in each district. The responsibility for law and order was assumed by government through the Collector, but the mechanics of police administration was entrusted to a new, functionally specific, department.⁶ The model was adopted in other provinces also subsequently and it provides, even today, the basic structure of the police in the country.

This was the situation regarding the police system when the country was taken over directly by the British Crown in 1858 after the abortive mutiny of 1857. The next few years saw hectic activity in the legislative field and two basic criminal codes viz. the Indian Penal Code and the Criminal Procedure Code were enacted in 1860 and 1861 respectively. With the two criminal codes coming into existence, it was imperative to have a police code for the implementation of criminal law in the country. The Government therefore appointed a Police Commission in the year 1860 and its recommendations provided the basis for the Police Act passed in 1861. There was, however, nothing very new in the Act of 1861 which only extended the system already prevalent in various parts of the country to the entire British Indian territory. Despite the many political changes which have occurred in the last 115 years, including the grant of independence to India, the police organization even today rests largely on the policy laid down in the Act of 1861.

The Police Commission of 1860 established the following principles of police organization :

1. Military police were to be eliminated and policing was to be entrusted to a civil constabulary.
2. Civil police were to have their own separate administrative establishment headed by an inspector-general in every province.

6. Bailey, p. 44.

3. The inspector-general was responsible to the provincial government as the superintendent was to the civilian collector.

4. The superintendent was to supervise the village police.⁷

In 1902 Lord Curzon appointed a new police commission which criticised the police force on grounds of corruption and inefficiency but did not, however, make any substantial recommendations.

Present Police Structure and Organization in India

Under the Constitution, police is a State subject and only residuary powers have been vested in the Centre. Under the residuary powers, the Centre controls the Central Bureau of Investigation, Central Reserve Police and the police forces of centrally administered territories. The items 'police' and 'public order' are specifically included in the State list. There are, however, certain other features of the Constitution which indicate that the Centre, if it so desires, can intervene in the law and order problems of the States in certain situations. Under Articles 256 and 257, the executive power of the States is subordinate to that of the Union. The Parliament is empowered to transfer any subject from the State list to the concurrent list in the national interest.⁸ The Centre has the duty to protect the States from internal disturbances.⁹ This right of the Centre has been considered in detail by a committee headed by J. N. Bhagwati, a former judge of the Supreme Court.¹⁰ The committee was inclined to recommend the transfer of 'law and order' subjects to concurrent list of the Constitution.

One reason for assigning the subject of police to the States and not to the Centre is that in a democratic set-up it is considered to be more desirable that the law enforcement bodies should have roots in the localities where they operate. A police force brought from outside may alienate the local people and it may not be easy for the police to act effectively in such a situation. The policemen belonging to the local or adjoining areas have the advantage of knowing the conditions and the people rather intimately. In England, this is the rationale for entrusting the local bodies with the

7. Bailey, p. 45.

8. Article 353.

9. Article 355.

10. Kerala Enquiry Committee.

law and order problem. In the U. S. A. the police forces are maintained both by the State as well as by the local bodies. There is no doubt that the local police has its advantages but, as such, it does not provide any guarantee that the rule of law shall be respected more by the local police as compared to the federal or national police. The observations of a British Police Commission are illuminating in this context :

British liberty does not depend, and never has depended, upon any particular form of police organization. It depends upon the supremacy of Parliament and on the rule of law. We do not accept that the criterion of a police State is whether a country's police force is national rather than local—if that were the test, Belgium, Denmark and Sweden should be described as police States. The proper criterion is whether the police are answerable to the law and ultimately, to a democratically elected Parliament. . . . In the countries to which the term police State is applied opprobriously . . . the foundations upon which British liberty rests do not exist.¹¹

Classification and Stratification

The police in India is classified vertically and stratified horizontally. The classification is in two categories viz. armed and unarmed police wings. On this point India is different from both Britain and the U. S. A. In the U. S. A. every policeman is armed while in England arms are not provided to any policeman. The unarmed police do most of the routine work of patrolling, prevention and investigation of crime while the armed branch is made use of in situations involving violence or physical force as in dealing with riotous mobs or for guard duties in banks or important public places or buildings.

The policemen are divided into a number of categories according to their status in the hierarchy. At the top in every State there is the Inspector-General followed by a number of Deputy Inspectors General and other officers down to the constable. The Inspector General, Deputy Inspectors General, Superintendents and Assistant Superintendents form the superior service group belonging to the prestigious Indian Police Service while Deputy Superintendents, Inspectors, Sub-Inspectors, Head Constables and

11. Royal Commission on the Police, 1962, Commd 1728, p. 45.

Constables are appointed by the State Governments. The Superintendent of Police is in charge of the entire police force in a district and is responsible to the District Magistrate, an I. A. S. officer, for the law and order problem in his district. This situation has given rise to an interesting though sterile debate quite often as to whether the District Superintendent of Police is subordinate to the District Magistrate or is his equal colleague in the district administration. There is, however, no doubt that many I. P. S. officers do not relish the idea that they are regarded as subordinates to comparable I. A. S. officers.

The situation is somewhat different in metropolitan cities like Calcutta, Bombay, Madras and Hyderabad where the office of the Police Commissioner combines the powers of the Superintendent of Police and those of District Magistrate for the purpose of law and order.

Education and Calibre of the Personnel

August Volmer in his book *THE POLICE AND MODERN SOCIETY* states :

The ideal police officer is expected to have the wisdom of Solomon, the courage of David, the strength of Samson, the patience of Job, the leadership of Moses, the kindness of the good Samaritan, the strategy of Alexander, the faith of Daniel, the diplomacy of Lincoln, the tolerance of the Carpenter of Nazareth and finally an intimate knowledge of every branch of natural, biological and social sciences.¹²

The same spirit is conveyed in the following words, though in more realistic terms, in an essay on police in the *Time* magazine :

Nothing is tougher than being a policeman in a free society : the policeman is supposed to mediate family disputes that would take a Supreme Court judge, soothe angry ghetto negroes despite his scant knowledge of psychology, enforce hundreds of petty laws without discrimination, and use only necessary force to bring violators to courts. The job demands extraordinary skills, restraints and character.¹³

12. Quoted by B. Sreekanth Reddy : *POLICE IN A DEVELOPING SOCIETY*, p. 144.

13. *Ibid.*

The extracts quoted above not only give some idea about the hazards involved in police work but also convey the nature of the qualities required in a policeman. An evaluation of the human material available to the police in India may therefore be attempted at this stage.

The recruitment to the Indian Police Service (I. P. S.) is made on the basis of a keen competitive examination in which fairly bright graduates and post-graduates are able to compete successfully. They do not however, represent the top intellectual talent of the country since most of the top students opt for careers in sciences, medicine, engineering and technology and lucrative jobs in the private and public sector. Even in government service, the Indian Foreign Service and the Indian Administrative Service are considered more prestigious.

The officers belonging to the State services *i.e.* not belonging to the I. P. S., do not possess substantial educational and intellectual attainments. The constable, lowest in the police hierarchy, is the most common visible manifestation of the police force so far as the lay public is concerned. He has rightly been called the backbone of the police organization. Unfortunately, partly due to the legacy of the British rule and partly due to the service conditions, the human material recruited to this crucial post leaves much to be desired. Traditionally they come from inferior backgrounds in terms of educational, cultural and economic status. The Delhi Police Commission observed in this connection :

From whatever angle one sees the pivotal policeman, it is essential that he must be a man of stature, educated, intelligent, alert, truly interested in work, possessing a good judgement, initiative and courage.

It is quite obvious that the targets set up by the Commission cannot be achieved even in a modest way in the existing structure. At present, non-matriculates or even those who are just literates are eligible for appointment to the key post of a constable.

The stakes involved can be gauged by referring to the fact that the constable is an 'officer' under the Criminal Procedure

Code which gives him substantial powers extending to making arrests without a warrant in certain situations.¹⁴

The requirement of higher education, as suggested by the various police commissions, may improve the situation to some extent but nothing very tangible shall be achieved unless the working conditions and emoluments are radically changed. What minimum qualification is to be prescribed is an important but only one aspect of the problem. To devise methods for securing the best men out of those who fulfil the minimum qualifications and eligibility conditions is a different issue altogether.

The situation regarding sub-inspectors and other officers upto the level of the deputy superintendents is not very satisfactory either. The qualifications prescribed in various States vary from matriculation to higher secondary and intermediate level though many of the entrants now are graduates or even post-graduates. This is different from the position obtaining in the U. S. A. and Britain where a college graduate will seldom be found in the police force. But apart from the issue of the relative merit of the degrees of the Indian universities and the universities in England and the U. S. A., the more pertinent question is as to what type of human material is actually available to the police. It is common knowledge that the police job is the last refuge for many who are unable to find anything more worthwhile.

Even in a much advanced country like the U. S. A. it is a problem to find out and recruit persons of a good calibre in the police force. Writing about the New York City Police Department, the largest in the world, Jimmy Breslin observes :

There are a number of reasons why a young man in New York takes a job as a policeman, nearly all of which are the pension. The pension, half pay after 20 years, runs a policeman's life. It is the only thing he is afraid of losing and it is the only thing he wants out of the job. After 20 years, he retires and collects the half pay and works as a security man at a bank or manufacturing plant somewhere. He starts this job at between the ages of 40 and 45. He holds it until he can quit and collect Social Security. At the end, he is a terribly bitter old man who wonders if he has wasted his life.¹⁵

14. Criminal Procedure Code, 1973, Section 151.

15. *New York Post*, September 9, 1968.

About the position in Denver, one of the big cities in the U. S. A., an officer of the police force had to make the following comment :

Almost any able-bodied man can become a policeman in Denver. If he is within the age brackets, if he is a high school graduate, if he has no criminal record, he is a cinch. At that, there aren't enough applicants to fill the vacancies. Maybe it has to do something with the pay, the hours, the risks. There could be other reasons, but you don't know them until you get in.¹⁶

Unlike India, the selection process in the U. S. A. is fairly rigid despite the fact that bright people do not generally opt for the profession. The extremely non-competitive situation of Denver may not be truly representative of the American position in general. For instance the selection process in the Berkeley police is described by Richard Blum in the following words :

For every two hundred applicants, approximately one hundred qualify on the basis of their application forms. After the written examination (primarily psychological testing including a standard intelligence test requirement of IQ 112) only 25 men remain to go on to the next step of the selection process. Three will fail the physical agility test, leaving twenty-two men of the original 200. Of these, four will be failed by the oral test and this leaves 18. The psychiatric examination will eliminate two men, while one man will fail the medical examination; this leaves 15 men. Of these one third, five rejected on the basis of background investigation. Ten men out of the original group of two hundred will be hired. About 20 per cent of these are lost during the two year probationary period, so that eight permanent employees remain.¹⁷

It follows, therefore, that twofold remedial action is required to improve the quality of police personnel in India. Firstly, the qualifications and emoluments of the policemen must be substantially revised so as to attract better persons. Surely, even in a poor country like India, there is a good case for policemen getting better emoluments than the peons and clerks employed in private and public sectors. Secondly, the selection process should be made more objective and scientific. It must be remembered that no

16. *Journal of Criminal Law, Criminology and Police Science*, 1962, Volume 53, No. 1.

17. *POLICE SELECTION* (Springfield, Ill : Thomas, 1964) p. 161.

amount of training is going to make basic changes in the human personality. Persons of low intelligence or of dishonest disposition are to be avoided very carefully. All this requires a thorough check-up of the applicants for police jobs in terms of psychological and psychiatric factors and their social and cultural background.

Police Strength in India

The police in India is largely concentrated in cities and towns where the proportion of the police force to the population is not very low compared to the highly developed countries like the U.K. and the U. S. A. In 1971, there was one policeman for every 800 persons in India which is a slight improvement upon the situation in 1960 when there was one policeman for every 848 persons.¹⁸ In Great Britain in 1961 there was one policeman for every 565 persons and in the U. S. there was one policeman for every 526 persons.¹⁹ The position in India, however, is very uneven as between the urban and rural areas. The average jurisdiction of a police station is about 200 square miles, covering one hundred villages, and with a population of approximately 75,000 persons.²⁰ According to a report of the National Sample Survey, in the mid-1950s police stations were on the average about 8 miles from any village.²¹ Despite some possible improvements since then, there is no reason to assume that there has been any considerable change in the situation in the last two decades.

There is of course the village police to supplement the regular police in the rural areas. Its quality, however, leaves much to be desired as pointed out by some police commissions and administrations. The West Bengal Police Commission observed :

Chaukidars and defadars are generally recruited from the lower stratum of society and many of them are illiterates and aged persons who are generally cultivators living within their beats.²²

Fendall Currie paints an interesting picture of the village

18. CRIME IN INDIA, 1960-1971.

19. Bailey, p. 63.

20. A. R. Nizamuddin : UNARMED POLICE IN INDIA, p. 12.

21. REPORT ON INDIAN VILLAGES, 1961.

22. Bailey, p. 74.

chowkidar in his book *BELOW THE SURFACE* in the following words :

...pasi by caste, thief by birth, hence selected to catch thieves and protect the villages' property. His badge of office, a brass-bound lathi, or club, a leather belt, and a chronic irritation of the larynx from sundown to sunrise. His leisure moments, when not perambulating the village making horrible noises, are occupied in assisting neighbouring chowkidars to carry out previously planned burglaries.²³

The tables on pages 174 to 177 show the actual strength of police, civil and armed, in the different States and the Union territories.²⁴

Investigation and Prosecution

Criminal investigation commences when the police comes to know of the commission of a crime. Crimes have been classified under the Code of Criminal Procedure as cognizable and non-cognizable. The former are more serious offences than the latter. In cognizable offences, the police has the power to investigate without any directive from a magistrate while in case of non-cognizable offences the police cannot proceed with investigation without the order of a magistrate. It is also provided by law that the police can arrest a person for the commission of a cognizable crime without a warrant issued by a court of law ; they cannot do so in case of non-cognizable crimes without an arrest warrant. When the police comes to know of the commission of a cognizable offence as a result of the information given by a person, the information, if not in writing, is to be reduced into writing and such a report whether given in writing originally or reduced to writing is known as the first information report.²⁵ The report, though not admissible by and large in trial proceedings, is nevertheless of crucial importance sometimes. Any inconsistency between the F. I. R. and the testimony given by a witness may even prove fatal for the prosecution in certain cases. Having regard to the importance of the F. I. R., police officers tend to be extra-careful in preparing it and any negligence in making out this report is the "most heinous sin a policeman can commit"²⁶.

23. Bailey, p. 74.

24. CRIME IN INDIA, pp. 73-74.

25. See Sections 41, 154, and 156 of the Code of Criminal Procedure, 1973.

26. Alakh K. Sinha: THIRTY-TWO YEARS IN THE POLICE AND AFTER, 1952, p. 182.

STRENGTH OF ARMED POLICE AS ON 31-12-71

S. No.	States/Union Territories	Number of			Inspectors & S.Is.	Officers below S.Is.	Total
		I.G., D.I.G. & S. P.	A. S. P./ Dy. S. P.				
1.	Andhra Pradesh	7	22	403	12,865	13,297	
2.	Assam	18	61	372	9,030	9,481	
3.	Bihar	14	39	339	11,041	11,433	
4.	Gujarat	13	36	150	8,546	8,745	
5.	Haryana	4	9	82	2,365	2,460	
6.	Himachal Pradesh	2	2	14	390	408	
7.	Jammu & Kashmir	7	15	93	2,538	2,653	
8.	Kerala	4	8	58	1,820	1,890	
9.	Madhya Pradesh	31	86	816	20,793	21,726	
10.	Maharashtra	8	16	213	7,415	7,652	
11.	Manipur	4	14	93	2,247	2,358	
12.	Mysore	4	9	220	8,455	8,688	
13.	Nagaland	3	33	128	4,223	4,387	
14.	Orissa	11	35	189	5,292	5,527	
15.	Punjab	6	22	192	5,362	5,482	
16.	Rajasthan	6	40	292	7,875	8,213	
17.	Tamil Nadu	6	25	153	4,424	4,608	

S. No.	States/Union Territories	Number of			Inspectors & S.Is.	Officers below S.Is.	Total
		I.G., D.I.G. & S. P.	A. S. P./ Dy. S. P.				
18.	Tripura	2	8	27	780	817	
19.	Uttar Pradesh	...	...	749	20,357	21,106	
20.	West Bengal	14	27	473	24,821	25,335	
21.	Andaman & Nicobar Islands	...	3	18	844	865	
22.	Chandigarh	...	1	22	677	700	
23.	Dadra & Nagar Haveli	...	...	...	38	38	
24.	Delhi	5	10	184	3,899	4,098	
25.	Goa, Daman & Diu	...	1	8	583	592	
26.	Laccadive Islands	...	...	...	...	...	
27.	Pondicherry	...	...	...	...	...	
Grand Total		169	522	5,288	1,66,680	1,72,659	

STRENGTH OF CIVIL POLICE INCLUDING DISTRICT ARMED RESERVE

S. No.	States/Union Territories	Number of			Inspectors & S.Is.	Officers below S.Is.	Total
		I.G., D.I.G. & S.P.	A. S. P./ Dy. S.P.				
1.	Andhra Pradesh	58	102		1,782	35,931	37,873
2.	Assam	40	72		1,495	16,466	18,073
3.	Bihar	62	160		2,574	32,198	34,994
4.	Gujarat	39	78		1,409	32,105	33,631
5.	Haryana	20	31		335	8,105	8,401
6.	Himachal Pradesh	15	23		276	5,188	5,502
7.	Jammu & Kashmir	16	19		210	6,049	6,294
8.	Kerala	24	56		618	15,985	16,683
9.	Madhya Pradesh	80	228		2,426	32,752	35,486
10.	Maharashtra	78	190		3,734	65,624	69,626
11.	Manipur	9	23		223	2,155	2,410
12.	Mysore	45	88		1,392	28,093	29,618
13.	Nagaland	5	9		92	2,432	2,538
14.	Orissa	43	69		1,663	16,183	17,958
15.	Punjab	38	77		892	16,857	17,864
16.	Rajasthan	53	152		1,681	28,291	30,177
17.	Tamil Nadu	62	146		2,461	35,867	38,536

S. No.	States/Union Territories	Number of			Inspectors & S.Is.	Officers below S.Is.	Total
		I.G., D.I.G. & S. P.	A. S. P./ Dy. S. P.				
18.	Tripura	9	18		220	2,484	2,731
19.	Uttar Pradesh	184	543		6,063	60,996	67,786
20.	West Bengal	91	179		5,033	36,017	41,320
21.	Andaman & Nicobar Islands	1	4		30	295	330
22.	Chandigarh	1	2		56	771	830
23.	Dadra & Nagar Haveli	...	...		4	57	61
24.	Delhi	22	62		1,450	11,322	12,856
25.	Goa, Daman, Diu	2	7		54	1,319	1,382
26.	Laccadive Islands	...	1		11	203	215
27.	Pondicherry	5	...		72	894	971
Grand Total		1,002	2,339		36,256	4,94,639	5,34,236

Difficulties of the Police

The work of investigation involves a visit to the location of the crime by the investigating officer, recording of testimony, making of arrest wherever possible and desirable, with the object of launching prosecution in the court of law. The job of investigation, quite tough and challenging as such, is rendered even more difficult in Indian conditions. The difficulties are mainly due to three factors : inadequate investigating staff, lack of scientific and technical personnel and equipment and the most important of all factors, lack of social support to the police agencies.

The investigating officers have to devote time to other kinds of routine work also and, as it has been earlier seen, their number is also not very large in view of the large population within their areas and the variety of problems in the Indian set-up. This leaves the investigating officers with very little time for actual detective work. The delay in the investigation may prove fatal in quite a few cases.

Very few cities in India have been provided with forensic laboratories with the result that sometimes the relevant objects are to be sent over long distances for expert analysis and report. In many police stations, there is no equipment to deal with fingerprints or to take photographs of various objects connected with the crime.

The problem created by the lack of cooperation with the police by the people is the most serious one and of great complexity and, therefore, requires somewhat detailed examination.

Firstly, the people in India are generally not willing to testify against their friends, relatives or neighbours. Unlike the highly urbanised and developed western countries, the relationships of various kinds tend to be more intimate and personal and very few would risk putting strains on the sensitive relationships.

Secondly, the relationship between the police and the public being somewhat strained, the people are ordinarily scared of the police and would, therefore, like to avoid any contact with them rather scrupulously. The potential witnesses have real and imaginary fears regarding the possible infliction of violence on them by the police.

Thirdly, there is a universal tendency among people to keep away from the problems of others. This lack of social responsibility bordering on callousness is visible everywhere in the Indian society. Instances are not wanting where broad daylight murders have been committed in the presence of scores of persons around without even one person having the courage to interfere with the offender. This tendency can be noticed even in some non-criminal situations like street accidents. Quite frequently the helpless victim is not taken care of by any passerby and is allowed to remain in a state of agony for hours together without anyone coming to his rescue. The injuries may even prove fatal sometimes.

Fourthly, the people are scared of retaliation from those against whom they testify. This fear of retaliation is not only reflected in inhibited behaviour in the context of tough guys and bullies but is present even in less dangerous situations. One has just to travel in a public transport bus in a city like Delhi to see how evetearing goes on unabated, sometimes in full view of many passengers around.

Fifthly, the people are inhibited from coming forward with evidence before the police because a witness has to face all sorts of hardships while appearing in courts. The distance a witness has to travel before reaching the courts, inadequate transport facilities and the frequent adjournments of court hearing are more than enough to curb the enthusiasm of many a witness. India being a poor country, most of the people make a day-to-day living and for many witnesses it amounts to financial hardship if they spend time in attending the courts. Though the Government is supposed to pay for the maintenance and travel of witnesses, the rates of payment are extremely low and unrealistic and there is sometimes a lot of delay in getting even what is payable. The Law Commission in its fourteenth report made the point that many witnesses are deterred from going to courts because of the absence of waiting facilities offered there.²⁷ Prof. Bailey, however, differs with the Commission and makes the following convincing observation :

I would hazard the opinion that relative to standards of life in both countries, waiting facilities in India are better

27. Vol. II, p. 754.

than in most public buildings in the United States. Perhaps the highborn, educated town man in India needs to be provided a chair and an interior room, but is this true for the majority of Indians? I suspect that provision of ample travel and maintenance allowances would be the most important reform that could be made.²⁸

Sixthly, the Indian rural society being what the sociologists term 'sacred' and, therefore, opposed to the secular concept of society, the villagers have their own notions of right and wrong. They may pass judgements on the wrongdoer and the victim on the basis of their moral notions which may be at variance with the legal or police view of the situation. The village community may in all earnestness believe that the victim was to blame for what happened to him or that the matter was 'personal' between the two individuals or groups and, therefore, the police had no business to intervene. There is no cooperation possible between villagers and the police in such a situation.

There is yet another difficulty experienced by the police while investigating a case against a suspect or putting him under arrest. All sorts of pressures are exerted on the police by the members of social, caste or professional group which the suspected or arrested person belongs to, to have the proceedings dropped. It is not an unknown phenomenon that when the police arrests a sweeper for an alleged offence, within a few minutes the police station is besieged by a hundred sweepers. A taxi driver is apprehended, and a lightning strike by the taxi drivers and other operators may paralyse the transport in the city. Instances have occurred where the students have staged strikes in their institutions or have taken out processions demanding the release of some student arrested for ordinary crime. Police work is made more difficult in such situations when political forces promptly appear on the scene to exploit the situation for their own ends.

The problem of perjury has special relevance in the Indian context since it is widespread in the country. The Law Commission in its fourteenth report observed :

The percentage of acquittals in criminal cases has reached a high figure ; and this is not always due to the police being unable to place adequate evidence before the courts. What

28. Bailey, p. 159.

often happens is, that the witnesses when they appear to give evidence in courts display a tendency to reduce the effectiveness of their evidence by deposing to a version different from that given by them in their statements to the police. The Inspector-General of Police, Bihar, told us that at least fifty per cent of the police cases failed because the witnesses turned completely hostile under the influence brought to bear upon them by the accused and his supporters.²⁹

Difficulties of Procedure and Evidence

There are some problems which are faced by the police flowing out of certain provisions of the Criminal Procedure Code and the Indian Evidence Act. Under the Criminal Procedure Code it is required that whenever police enter any premises for the purpose of search and seizure, they must be accompanied by at least two respectable inhabitants of the locality.³⁰ Since it is not always possible to find two respectable persons willing to associate with the police for the purpose, the police find themselves in a difficult situation and hence try to observe the formality with the cooperation of some 'respectable' persons who might be of dubious character and reputation. Courts being aware of such police practices, treat the evidence produced by search and seizure with utmost suspicion and even genuine prosecution cases are adversely affected in the process.

Then there is the provision in the Criminal Procedure Code which bans the use of any statement, made by a person to a police officer in the course of investigation, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.³¹ It is, however, permissible to use the statement for the limited purpose of contradicting a witness if there is an inconsistency between his statement made before the police and the subsequent testimony in the court.³² The rationale of this principle can be appreciated by referring to the observations made by the Supreme Court :

... The police officer in the course of his investigation finds himself more often in the midst of an excited crowd and babel of voices raised all round. In such an atmosphere,

29. Vol. II, p. 754.

30. Section 100(4).

31. Section 162.

32. Evidence Act, Section 145.

unlike that in a court of law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the statement which appears to him to be relevant. These statements are, therefore, only a summary of what a witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or assurance by him that it is a correct statement.³³

The Evidence Act contains some provisions which are meant to protect persons suspected of crimes from police brutalities. A confession made to a police officer is not admissible as evidence in a court of law.³⁴ This provision, though enacted with good motive, nevertheless creates unnecessary hardships to the police in prosecution work. There is no harm in making confessions before a police officer admissible in evidence though the courts may be extra-cautious while dealing with the question of authenticity of such confession. Obviously admissibility of a piece of evidence as relevant is one thing but relying on it is quite another thing. The same holds true of the statements made to a police officer whose admissibility has been barred under Section 162 of the Criminal Procedure Code. There are good reasons, as pointed out by the Supreme Court, for not treating a statement made to the police as a good and highly dependable piece of evidence, but surely there is nothing wrong about its being made admissible before a court of law. There are some police officers who justifiably argue that it is not possible to make the police law-abiding unless some confidence is reposed in them. They insist that police *has* to use third degree methods because of so many legal disabilities created in their case.

The Law Commission, however, is strongly against removing the ban on the admissibility of confessions made to the police officers. It observed :

The large mass of offences in our country are investigated only by the subordinate police officials. The high sense of fairness and justice which might actuate the superior personnel does not permeate the lower ranks. To make a confession

33. *Tehsildar Singh v. State of U. P.*, AIR 1959 SC 1012.

34. Section 25.

made to a subordinate police official admissible in evidence would therefore, be fraught with dangerous consequences.³⁵

The Commission therefore recommended that, on experimental basis, confessions made to an officer of the Deputy Superintendent level or above may be made admissible provided the officer concerned conducted the investigation himself.

The ban on the admissibility of the confessions made to a police officer has not, however, succeeded to a great extent in protecting the accused persons from the use of third degree methods by the police. Though the confession made to a police officer, as such, may not be admissible in trial, the law permits the use in evidence of anything recovered as a result of the confession made to a police officer by the accused.³⁶ Thus if a weapon used in a murder or burglary is recovered by the police as a result of a confession made by an accused person, the recovery of the weapon becomes a relevant piece of evidence. The police makes quite liberal use of violent methods to extort confessions which may lead to the discovery of some incriminating evidence with the result that the protection given under Section 25 of the Evidence Act is taken away to a substantial extent under Section 27 of the Act.

Record of Police Performance

There are two standards which are generally applied to test the efficiency of the police. One is to see the number of arrests made by the police for the offences coming to their knowledge and the other is the rate of conviction for the cases brought by the police to the courts of law. It is obvious that none of the two standards is capable of measuring the real efficiency of the police. The 'clearance by arrest' test suffers from the fact that the decision to arrest a person may not always be on the *bona fide* belief of suspicion and the arrest may sometimes be made just because someone or the other has got to be arrested for the commission of the crime since failure to arrest anyone would reflect on the efficiency of the officer concerned. The 'clearance by conviction' test may give more scientific results in the sense that the conviction of an accused person proves that the police case has been vindicated beyond any reasonable doubt under the prescribed law and procedure. But whether a person is convicted or not depends not only

35. Law Commission Fourteenth Report, Vol. II, p. 748.

36. Evidence Act, Section 27.

upon the merit of the prosecution case but also upon other variables like the cooperation of the witnesses and the judicial attitude towards the question of appreciating the evidence tendered by the police. In India it is fairly usual for the witnesses to change their earlier statements while in the witness-box. It is not only because the majority of the witnesses, particularly in rural areas, are uneducated and inarticulate but also, as discussed earlier, due to the pressure brought by the accused person and his supporters through all imaginable means. As regards appreciation of evidence by the courts, it is common belief among policemen that no case, however strong against the accused, can be successfully prosecuted in a court unless some extra evidence is invented to eliminate any possible risk of failure to get a conviction.³⁷

Be that as it may, the clearance rate by reference to the number of arrests and convictions is regarded as a good indication of police efficiency. Comparing the clearance by arrest rate in India with those in the U. S. A. and Britain, Prof. Bailey has concluded that the Indian police has shown greater efficiency than the other two countries. He observes :

CRIME IN INDIA reported that chargesheets were laid in 52.5 per cent of all true cases in 1959 ; and in 50.6 per cent in 1958.

This means that in just over half of all crimes known to the police, persons were arrested and charged with the offence. The "cleared by arrest" figure has remained within a percentage point or two above fifty since that time. The Indian record is significantly better than that of Great Britain or the United States. England and Wales in 1963 had a clearance rate of 43.1 per cent for all indictable offence. In the U.S.A., the clearance rate for serious crimes was 26.5 per cent. And while the Indian clearance rate appears to have remained steady during the late fifties and early sixties, the rates in the U. S. A., England, and Wales have declined steadily.³⁸

The police performance in India in 1971 can be gauged by the following available information.³⁹ There was a total of 11,08,588

37. A middle level police officer of Delhi told me, on the basis of his long experience in Delhi and U. P., that it is not very infrequent that in some cases the court rejects some pieces of genuine evidence but accepts the padding part of the prosecution story.

38. Prof. Bailey : *THE POLICE AND THE POLITICAL DEVELOPMENT IN INDIA*.

39. *CRIME IN INDIA*, 1971, pp. 72-74.

cases to be dealt with by the police. Out of this number, the police did not investigate or refused to investigate 56,067 cases which works out to be 20% of the total number of cases. 83,663 cases were declared to be false or non-cognizable. The percentage of cases detected by police in relation to total cases investigated was 52.84. The police was able to get conviction in 61.97% cases in which trial was completed during the year.

Though the above figures may show that police efficiency in India is fairly high compared to some other countries, such heartening inferences ought to be drawn with great caution. Firstly, it must be understood that the efficiency of police as manifested through arrests and convictions is not the only factor to be considered in evaluating the quality of police work. The vital point not to be lost sight of is the *quality* of methods employed by the police. Third degree methods, illegal searches and wrongful confinements may give better results in terms of statistics, but a decent society may not like to achieve 'better' results at such a heavy price in terms of human dignity and individual liberty. Keeping this aspect in view, it has been suggested that the record based on the clearance rate should not be the guide for giving promotions to police officers. Such a basis for giving the credit gives rise to a perverted attitude on the part of the police officers which may be manifested in all kinds of unscrupulous techniques employed with the sole objective of getting impressive statistical results. That there is no necessary correlation between efficiency and the results achieved can be appreciated by keeping in mind the fact that the world-famous London Metropolitan Police is not credited with more than 30% to 40% of successful prosecutions out of the total cases launched by them in the courts.

Secondly, the issue of police efficiency is intimately connected with the quality of crime reporting and registration in a community. Obviously, in a country where a vast mass of crimes go unreported or uninvestigated, the statistics on the basis of actual arrests and convictions may give a relatively heartening picture of the police achievements which they might not in fact deserve.

Police and Public Disturbances

The police has to perform a much more delicate and dangerous tasks while dealing with riots and public disturbances compared to what they have to do in dealing with the problem of ordinary

crime. It is in this area of police activity that the risk of public criticism and condemnation is maximum. Traditionally the police has always been used the world over by persons wielding political power to serve their interests, which provides the most potent cause of public antagonism towards police today. Some time back it was easier for the police to get unanimous support from the upper and middle class people since the police stood for the protection of the values of these classes. Things have changed in the recent past and new groups have emerged out of persons who, despite their belonging to the upper and middle classes, do not subscribe to the traditional values of those classes. In some affluent countries these groups, known as the New Left, have clashed frequently with the establishment resulting in direct confrontation with police. In the U. S. A., race riots also have posed frequent problems to the police in the past.

In India, as discussed earlier, the variety of public disturbances is unique and exceptionally wide. Riots take place due to the exploitation of religious, communal, regional and political issues. The two most difficult situations faced by the police are disturbances where students or labourers happen to be the parties involved in the trouble. In both the situations, a very great degree of forbearance and tact is required. The police stands to gain unpopularity if the force used is considered 'excessive' and also if they do not use adequate force. It is obvious that in theory it is alright to tell the police that they should exercise restraint and use minimum amount of force, but practically it becomes difficult to implement. When the situation flares up and gets beyond control, the senior police officers have to control two mob-like groups, the rioters and the policemen.

In 1971,⁴⁰ the police in India had to open fire on 1183 occasions and except in the case of States like Uttar Pradesh, Madhya Pradesh and Rajasthan which had to deal with dacoits in a big way, in most of the cases the firing was in connection with the control of public disturbances. Out of 1177 cases of firing, for which information is available, 653 (58%) cases were of riot control operations, 185 against dacoits and 339 against other criminals.

40. CRIME IN INDIA, 1971.

The relative magnitude of the riots can also be demonstrated by citing the figures for police casualties in controlling riots and ordinary criminal activities.

In all, 187 policemen were killed in 1971 : 9 in dacoity operations, 45 by riotous mobs, 62 by other criminals, 9 in border duties and 187 in accidents.

The number of policemen injured was 3248 out of which riotous mobs claimed the biggest chunk of 2087 persons.

Police-Community Relations

The unpleasant police-community relationship is of universal nature, the degree of bitterness varying from community to community and from time to time. The image of 'bobby', the London Metropolitan Police constable, whom the common man regards as friend, philosopher and guide, is a rare phenomenon in the police-public relationship. The extent of the apprehension of the possible abuse of power by the police can be judged by the fact that Sir Robert Peel, the British Prime Minister, faced stiff resistance when he introduced the same Metropolitan Police for the first time in the early nineteenth century. Charles Reith, in his book *THE POLICE IDEA*,⁴¹ describes the hostility to the idea 'of developing a metropolitan police force out of fear that the notorious activities of the pre-revolutionary French police would be duplicated. He cites a parliamentary report of 1818 which considered the police idea and recommended against the establishment of a police force :

The police of a free country is to be found in rational and humane laws—in an effective and enlightened magistracy—and in the judicious and proper selection of those officers of justice, in whose hands, as conservators of the peace, executive duties are legally placed, but above all, in the moral habits and opinions of the people ; and in proportion as these approximate towards a state of perfection, so that people may rest in security ; and though their property may occasionally be invaded or their lives endangered by the hands of wicked and desperate individuals, yet the institutions of the country being sound, its laws well-adjusted, and justice executed against offenders, no greater safeguard can be obtained without sacrificing all those rights which society was instituted to preserve.⁴²

41. Charles Reith : *THE POLICE IDEA : ITS HISTORY AND EVOLUTION IN ENGLAND IN 18TH CENTURY AND AFTER* (London : Oxford Press, 1938).

42. Quoted, Jerome H. Skolnick : *JUSTICE WITHOUT TRIAL*, p. 1.

The police-community relationship in India has always been far from pleasant and helpful to each other. Some of the aspects of the problem have already been touched on in the discussion relating to the difficulties faced by the police in investigation and trial of crimes. It has also been seen that the police force, as represented by the villainous *darogha*, was known for its wanton atrocities and unabashed corruption in the medieval period. The British rule did not make much difference except that the *darogha* was replaced by the sub-inspector. Consequently the police-public relationship continued to be rather uneasy.

Apart from the factors which operate to make police unpopular anywhere in the world an additional problem in India is the history of hostility dating back to the freedom struggle during the British rule. The police, as was expected of them, had the duty to enforce the law and order and a confrontation with the public was inevitable. The policeman, being the most visible manifestation of the alien rule and oppression, was placed in an unenviable position and was the obvious target of public fury. The scars created due to the conflict remain even to this day and the bad image of the police continues unfadingly. Unfortunately the clashes between the forces representing the government and the public have continued due to the stresses and strains experienced in an infant democracy, aggravated by the difficult socio-economic conditions. The police-community problem, therefore, needs to be discussed in the light of different points of view held by the public and the judiciary on the one hand and of the police on the other.

Judicial and Public Image of the Police

The literature on Indian police is full of adverse comments made upon them for their dishonesty, corruption, unscrupulous methods in investigations and general lack of efficiency. In the words of O. Chinnapa Reddy, Judge, Andhra High Court, the police have always been the object of attack by press and politician, Bench and Bar, lawyer and legislator, rogue and reformer, citizen and criminal. The police practices during the Moghul and East India Company periods have already been referred to earlier. The police commission of 1902 made the following comment:

The police is far from efficient ; it is defective in training and organization ; it is inadequately supervised ; it is generally

regarded as corrupt and oppressive; and it has utterly failed to secure the confidence and cordial cooperation of the people.⁴³

There is no apparent reason to think that the situation has altered very much during the last 75 years or so.

Speaking of unscrupulous practices employed by policemen in investigation work and extorting confessions, Mr. Justice Straight of the Allahabad High Court reached the following pessimistic conclusions :

These legislative provisions leave no doubt in my mind that the Legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture; nor do I doubt that the Legislature, in laying down such stringent rules, regarded the evidence of public officers untrustworthy It requires no vivid imagination to picture what too often takes place when two or three of these not very intellectual highly-paid police officers are called away to a village to investigate a grave crime, of which there are no very clear traces. Naturally it is much the easier way for them to begin by endeavouring to obtain a confession from the suspected person or persons, instead of searching out the clues to the evidence from independent sources I say it in no harsh sense of disparagement, but it is impossible not to feel that the average Indian policeman . . . is not likely to be over nice in the methods he adopts to make a short cut to the elucidation of a difficult case by getting a suspected person to confess.⁴⁴

About 70 years after, Justice Anand Narain Mulla of the same High Court,⁴⁵ passed severe strictures on the police force of the country as a whole when he labelled them as the 'biggest single lawless group' in the country. Mr. Mulla has also expressed the view subsequently that crimes in the country could be reduced to half if the police was disbanded !

Why is the police image so bad? The answer cannot be given in terms of one or two factors. There are many contributory factors responsible for the unfortunate situation, some of which

43. POLICE COMMISSION REPORT, 1902, p. 150.

44. *Queen Empress v. Babu Lal*, (1884) 6 All 509.

45. Later, a member of Parliament.

have been referred to earlier. To quote Justice O. Chinnappa Reddy :

I think it is due to a combination of several circumstances. Occasional highhanded behaviour including acts of violence; occasional prejury; more important than the actual highhandedness and perjury; an attitude of casualness and indifference in the exercise of highhandedness and the giving of perjured evidence; the corruption of a few; a general misunderstanding of the police procedure, methods and work; a reminder of one's own acts of trespass and a general resentment of authority are several of the factors which contribute to a citizens hostility towards a policeman.⁴⁶

Police and Minority Groups

The relationship between the police and the minority groups, based on religion, race or language, presents some peculiar problems. It is obvious that the police being in the hands of the politically dominant majority group, the minorities are bound to have some real or imaginary grievances against them. Another factor, which distinguishes the minority groups generally, is their relatively weaker economic condition. The Negroes and the Puerto Ricans in the U. S. A. provide examples. The peculiar socio-economic conditions bring such groups in more frequent conflict with the police. The population of blacks in the U. S. A. is 10% of the total population but they are represented in about 30% of the cases dealt with by the police. How far racial prejudices are responsible for this situation, cannot be established. What is, however, important is the presence of such a belief in the minds of the members of minority groups, since it is the actual belief which determines their relationship with the police.

In India too a feeling is found among some minority and weaker groups sometimes that the police does not act impartially and they are not given equal protection by the police. The instances of real or supposed occurrences of police atrocities on Harijans are legion.

Similarly many people of the Muslim community express a feeling that they are the worst victims of police action in the wake of communal riots in terms of number of killings and arrests caused by the police. A perusal of what has been written in the press after

46. DEVELOPING SOCIETY AND POLICE, Osmania University Publication, p. 2.

various communal flares would show that such a feeling against the police is fairly widespread. Writing about the communal disturbances in Malegaon in Maharashtra, the eminent journalist, Mr. Khushwant Singh commented :

Since the circumstances which led the police to react the way it did may soon become *sub judice*, the best I can do is to give you the names of the people killed by the police firing: Abdul Aziz, Shakeel Ahmed, Inamdar Inayat Khan. Every one of those injured is also Muslim. (Two of them have since died.) A curfew was imposed on certain localities of Malegaon—again all Muslim.⁴⁷

The Modan commission enquiring into Bhivandi riots found that the policemen had disgraced their uniforms.

The Police point of view

The police complain that the public and politicians see only the dark spots of police enforcement. No one bothers to understand the severe limitations within which a policeman has to operate, the hard work which he has to put in with bad service conditions and poor emoluments, and the emotional strains caused by being up against criminals and bad characters all the time without adequate public sympathy and support.

Regarding the peculiar problems faced by the policemen, Martin Symonds, a medical man attached to the New York City Police for 20 years, observes :

Considering the nature of police work and the stress it places on the individual, I have been impressed with the mental health of the ordinary policemen. The job of being a policeman is unique. It is one of the few occupations that a man engages in for which he is feared, sometimes hated, occasionally reviled, or even assaulted in the ordinary performance of his duties. When we consider that most people need and want to be liked, and that the young patrolman starts his career by seeing himself as an individual who will help and protect others, the uncooperativeness, antagonism, or hostility of the public whom he serves will place an emotional strain on him.⁴⁸

47. Illustrated Weekly of India, April 20, 1975.

48. *Emotional Hazard of Police Work*, Paper presented before the Academy of Police Science, New York City, 1969.

Writing on the same point, the following words written by Mart Stern provide interesting and informative reading :

As a group, policemen have a very high rate of ulcers, heart attacks, suicides, and divorces A man can't be a cop for eight hours and then just turn it off and go home and be a loving father and husband—particularly if he's just had somebody die in the back of his police car.⁴⁹

One of the most serious grievances of the police in India is the political interference with their work and there is certainly a lot of substance in it. The political interference is manifested in appointments, transfers and promotions of police personnel which affects their initiative and efficiency. There is a feeling among the police personnel that it is difficult for an independent person to survive in the service. S. K. Ghosh, a retired inspector-general of police of Orissa makes the following observation in this connection :

The more original, honest and earnest the Inspector-General or for that matter any other police officer down to the rank of officer-in-charge for a police station is, the less likely he is to remain in office.⁵⁰

Events in Kerala during the period from April 1957 to July 1957 and West Bengal after the United Front ministry came to power in 1967 clearly showed the extent to which the government interfered with the police work. It was the height of irresponsibility on the part of the West Bengal government that they issued a circular to the police that they should not take any action against culprits in any industrial 'gheraos'. It was only when the High Court declared the circular to be illegal that police were able to act in such situations.⁵¹

Political interference is also quite in vogue regarding day-to-day functioning of the police. Instances are not wanting where political bosses bring pressure on the police for getting the proceedings against accused persons dropped. In almost every locality there are bad characters, known to be in close contact with the

49. *What Makes a Policeman Go Wrong?* Journal of Criminal Law, Criminology and Police Science, 1962, Vol. 53, No. 1.

50. LAW AND ORDER, Eastern Law House, 1972, p. 107.

51. See *Jay Engineering Works v. State of West Bengal*, AIR 1968 Cal 407.

political forces, who are considered to be immune from any police action.

In India we are not in a happy position to say as Lord Chesham said in the House of Lords in 1958 :

No public authority or anyone else has any authority to interfere in relation to the enforcement of law by the police. Full responsibility for enforcement is reserved entirely to the Chief Officer of Police. He is answerable to law alone and not to any public authority.

Conclusions

People get the government they deserve. Probably the same is true of the police force also. The police force of a country cannot be very different from the rest of the society. Police in India may be corrupt to some extent, it may be brutal and inefficient also. But then what is the quality of the other things in our national life? Corruption is an accepted way of life in the country and police has not monopolised it. Some of the policemen may be rude but then politeness is not a very common phenomenon in other areas of life either. Not very infrequently one experiences the same rude behaviour whether it is from the conductor of a public transport bus or an employee of a nationalised bank and like. What is therefore needed is a positive and sympathetic attitude towards the police and their problems. Some inspiration may be derived from the following statement which was made by Sir Frank Soskier, a former British Home Secretary, in the House of Commons :

Quite often we are a little unreasonable in our approach to the police. We expect that the less sleep they have, the more amiable they will become. They have a different task. They are constantly in active contact with the most disagreeable members of our community. And when they have to deal with the more agreeable members, it is generally upon very disagreeable occasions and when those usually agreeable members are in their most disagreeable moods. For years we have over-worked them and habitually over-criticised them. I wish that we can persuade them that the kind of criticism that we direct against them should really be taken by them as a compliment, because it indicates the very high standards that we expect from them. Their task is difficult—the kind of task that they have to encounter when they meet the sort of

pompous ass who knows a little law and who, when a police officer asks him to move his car, thinks that some tremendous principle of constitutional propriety is involved. Not only is their work difficult, it is dangerous.⁵²

M. Shafi. Bhat
Katoasoo (Islamabad)
U.B (Ind team) 1988
M. Shafi. Das
Nildora (Shopian)
U.B (Ind team) 1988

Dinesh Singh
H. 75
J. S. S. S.
1981

2. Quoted, P. S. Ram Mohan Rao: *THE DEVELOPING SOCIETY AND POLICE*, pp. 66, 67.

Chapter IX

CRIMINAL LAW AND ITS ADMINISTRATION

Criminal law provides the ultimate means to the society for the protection of individuals and its institutions. Criminal law has to be strong enough, both in its content as well as in its implementation, without being harsh or arbitrary. These qualities are needed in all the branches of law but nowhere are they so crucial as in criminal law since the stakes involved are exceptionally high in terms of social injuries of various kinds. To understand the mechanisms employed to achieve the above mentioned objectives, it is necessary to examine the fundamental features of the administration of criminal law through police and courts. A brief description of the substantive criminal law and the rules of evidence and procedure followed in administering it is made here.

Substantive Criminal Law—A General View

The penal law in force in India is to be found in the various statutes enacted by the Central and State legislatures. The general substantive criminal law, operative throughout the country, is laid down in the Indian Penal Code enacted in the year 1860. The Code, well-known for its skilful drafting, was the creation of Macaulay and his colleagues. Some minor changes have been made in the Code since then but, by and large, it has retained its original form and content. The Penal Code incorporates various theories and principles of the common law of England with some modifications here and there to suit the Indian conditions.

Besides the general substantive law of crimes as laid down in the Penal Code, there are many special and local enactments confined in their application to special fields of crimes or to particular local areas. These enactments deal with, for example,

prevention of corruption, food adulteration, violation of customs and foreign exchange rules, gambling, dowry problem, untouchability, prohibition, narcotics and cattle trespass. The modern State is concerned not only with the traditional law and order problems but has to enforce various socio-economic policies as well. This new responsibility undertaken by the State has given rise to the enactment of many laws creating a vast number of regulatory and welfare offences.

The Penal Code being the general code of criminal law in the country covers a vast variety of offences. It seeks to protect the individual from injuries relating to mind, body, property and reputation. Some of the obvious examples are the acts of murder, kidnapping, rape, criminal intimidation, theft, cheating, criminal breach of trust and defamation, which have been made punishable under the Code.¹ Then there are offences relating to the State, Government, public tranquillity, social institutions like marriage, religion and public decency and morals.² The following is a brief survey of the principles of criminal law.

INDIAN PENAL CODE

Jurisdiction

The following two kinds of jurisdiction provide the basis for the application of the Penal Code ;

1. *Territorial jurisdiction*³ : The Penal Code is applicable throughout the Indian territory except the State of Jammu and Kashmir. According to International Law, the general territorial jurisdiction of a State extends into the sea as far as a cannon shot would travel, the conventional distance being one marine league or about three miles. The tendency on the part of many countries including India in the recent past has been to extend the maritime belt. The territorial jurisdiction is based on the principle that all crime is local.

1. See Sections 302, 363, 376, 506, 379, 420, 406 and 500 respectively.

2. Sections 121, 124-A, 149, 494, 497, 295, 292 respectively.

3. Section 2.

It follows, therefore, that all persons including foreigners on Indian soil are subject to the law laid down in the Code. Some exceptions from criminal law process have been made by the Constitution and the international conventions regarding President and Governors while holding their office, foreign sovereigns and ambassadors etc.

2. *Extra-territorial jurisdiction*⁴: The Penal Code is also applicable to any citizen of India without or beyond India. This is based on the theory that every nation possesses the right to regulate and govern its own subjects everywhere on the basis of natural allegiance which it claims from its citizens. The jurisdiction also extends to any person on a ship or aircraft registered in India wherever it may be.

Elements of Crime

A criminal offence generally consists of two elements *i. e.* the mental and physical elements. Certain mental condition *viz.* intention, knowledge, negligence or rashness is ordinarily necessary for committing a legally forbidden act. The requisite mental and physical conditions are expressed by the terms *mens rea* and *actus rea* respectively. Since both the components are generally necessary for the commission of a crime, it is said that no crime is committed unless there is concurrence of guilty act and guilty mind. The common law maxim, *actus facit reum nisi mens sit rea*, conveys the same principle.

The concept of 'act' constituting *actus reus* is of very wide import. According to Salmond the term means any event which is subject to the control of the human will.⁵ The term, therefore means not only positive acts but also negative acts *i. e.* omissions to act. It should, of course, be understood that omission to act can be a component of a criminal act only if there is a legal duty to act in a given situation. The framers of the Indian Penal Code made the following observations to indicate the extent to which

4. Penal Code, Sections 3 and 4, Code of Criminal Procedure, Section 188.

5. SALMOND ON JURISPRUDENCE, (8th edition) p. 380.

omissions were to be treated as acts in the context of criminal liability.

...some of these omissions ought to be punished; in exactly the same manner in which acts are punished, secondly, that all these omissions ought not to be punished. It will hardly be disputed that a gaoler who voluntarily causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who voluntarily causes the death of an infant entrusted to her care by omitting to take it out of a tub of water into which it has fallen ought to be treated as guilty of murder. On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission. . . .

Mens rea or the guilty mind is the other essential component of a criminal offence. Just as *mens rea* alone is not punishable unless followed by the *actus reus*, *actus reus* without *mens rea* can also not constitute an offence. Various expressions like intentionally, knowingly, rashly, negligently and dishonestly are used to denote the various mental states involved in different offences.

As mentioned earlier, the maxim *actus non facit reum nisi mens sit rea* is of common law origin.⁶ The doctrine has been incorporated in most of the statutory crimes in England, India and other countries. The difficulty, however, arises in interpreting these statutes where there is no reference whatsoever to the mental state of the wrongdoer. The problem is that, on the one hand, the courts are required to interpret the statute as it is without resorting to any extraneous considerations and at the same time the judges find it extremely unfair to find a person liable in the absence of a guilty mind. The courts have, therefore been unable sometimes to get rid of the common law principle even in statutory offences. Lord Goddard L. J., observed in *Brend v. Wood*⁷.

It is of the utmost importance for the protection of the liberty of the subject that a court shall always bear in mind

6. The judge-made law of England is distinct from the law subsequently laid down in the statutes.

7. (1946) 62 TLR 462.

that, unless a statute either clearly or by necessary implication rules out *mens rea*, as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

The same principle has been applied by the Indian courts in many cases and the courts have been very cautious in finding *mens rea* absent in the various statutory crimes.⁸ In *State of Maharashtra v. Mayor Hans George*⁹, Subba Rao, J. explained the position as follows :

It is a well settled principle of common law that *mens rea* is an essential ingredient of a criminal offence. Doubtless a statute can exclude that element, but it is a sound rule of construction adopted in England and also adopted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded *mens rea*. To put it differently, there is a presumption that *mens rea* is an essential ingredient of a statutory offence : but this may be rebutted by the express words of a statute creating the offence expressly or by necessary implication. But the mere fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. It is also necessary to enquire whether a statute by putting a person under strict liability helps him to assist the State in the enforcement of the law : Can we do anything to promote the observance of the law?... *Mens rea* by necessary implication can be excluded from a statute only where it is absolutely clear that the implication of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law. . . .

General Exceptions

As mentioned earlier, generally there is no liability under criminal law unless there is a guilty mind. Following this principle, an entire chapter in the Penal Code has been devoted to the conditions which negative criminal liability due to lack of *mens rea* and all the provisions of the Penal Code are subject to it.⁹

8. AIR 1965 SC 722 : (1965) 1 Cri LJ 641.

9. Chapter IV, I. P. C.

The following are some of the more important situations covered by the exceptions :

1. Act committed due to the mistake of fact in good faith. Mistake of law is not recognised as a defence. (Sections 76, 79)
2. Act caused by accidents or some mishap despite proper care and attention observed. (Section 80)
3. Act committed because of necessity *i. e.* to prevent greater harm in a compelling situation. (Section 81)
4. Act of a child under 7 years in all cases and the act of a child above 7 years but below 12 years of immature understanding. (Sections 82, 83)
5. Act of a person of unsound mind is exempted from criminal liability if at the time of the commission of the act he was incapable of knowing the nature of his act or that what he was doing was wrong or contrary to law (Section 84). The law is based on McNaghten's Rules propounded in England about one hundred years back. Nothing less than total destruction of cognitive faculties is covered under the exception and hence it is evident that the concept of legal insanity is narrower as compared to the concept of medical insanity. The defence of irresistible impulse, recognised in some of the American jurisdictions, is not covered under the Indian law.
6. Act of an intoxicated person is a complete defence if the intoxication is involuntary. Even voluntary intoxication may provide a defence in limited situations. (Sections 85, 86)
7. Acts done by the consent, express or implied, or without consent of the sufferer in his own interest. (Section 87, 88, 89 and 92)
8. Act (except murder or any offence against State punishable with death) committed under threat of death. (Section 94)
9. Acts done in the reasonable exercise of the right of private defence of person or property. (Sections 96-106)

Parties to the Crime

Ordinarily a person is liable for his own guilty acts. There are, however, some situations when one is liable for the criminal acts of others also. Under the statute a duty may be cast upon a person to manage things in a certain manner and he may be liable even if the failure regarding the statutory duty is not his own but of someone acting on his behalf. A master may be made liable for the acts of his servant under a statute. So far as the general law of crimes is concerned, one may be involved in certain situations in such a way that though he did not commit a criminal act himself, he either acted in concert with others or abetted the criminal acts. Every member of a group becomes liable for every act committed by any of them in furtherance of the common intention of the group members irrespective of the actual part played by the individuals.¹⁰ Similarly members of an unlawful assembly may become liable for any criminal act committed by any member in the prosecution of the common object of the assembly.¹¹

Abetment of a crime is also a crime. Abetment may be committed by instigating another to commit a crime or by entering into a conspiracy to commit a crime or by providing necessary aid to another in the commission of the crime. The aid may be given before the commission of the offence or at the time or subsequent to the commission of the offence. The abetment of an offence is punished in the same way as the actual commission of the offence if the abetment actually results in the offence abetted, otherwise a lesser punishment is provided for the abettor.

Inchoate crimes

Crimes like conspiracy and attempt to commit an offence are complete crimes in themselves and, therefore, the word 'inchoate' may not be very apt to describe them. They are nevertheless sometimes referred to as 'inchoate' crimes since these are not by themselves the ends contemplated by the offenders.

There are three stages involved before the actual commission of an offence, viz. intention to commit an offence, preparations

10. I. P. C., Section 34.

11. I. P. C., Section 149.

made towards the commission of the offence and finally the attempt to commit the offence which if successful would result in the ultimate crime. Generally speaking, the first two stages in the commission of a crime *i. e.*, the intention and preparation, are not punishable but the act becomes punishable when the stage of attempt is reached. The rule that mere intention or preparation is not cognizable is subject to a few exceptions. The offence of criminal conspiracy is committed as soon as there is an agreement between two or more persons to commit an offence.¹² Similarly some preparations are also made punishable in the Penal Code. Examples are preparation to commit dacoity, to wage war against Government of India and to counterfeit coins.¹³ The reason as to why criminal intention and preparation are not punishable as such is that firstly, it may be difficult to establish the guilt in such cases and secondly, mere intention or preparation do not cause much alarm or any damage to the society.

INDIAN EVIDENCE ACT

Evidence in Criminal Proceedings

The purpose of the law of evidence is to provide rules for the reception of relevant evidence in courts of law relating to matters in issue and to help the judge in drawing rational inferences from the evidentiary material produced before him. Without such rules of evidence the trial sometimes could go on indefinitely with all sorts of conceivable evidence being tendered by the parties to the proceedings. In India the rules of English law of evidence have been codified in the Indian Evidence Act, 1872. The main principles underlying the law of evidence are the following :

1. Evidence must be confined to the matters in issue.
2. Hearsay evidence must not be admitted.
3. The best evidence out of what is available must be given in all cases.

The following is a brief description of the rules of evidence which are of peculiar relevance to the administration of criminal justice.

12. I. P. C., Section 120-A.

13. I. P. C., Sections 399, 122, 235.

Corroboration of Evidence

Since the stakes are very high in criminal trials, corroboration of evidence given by a witness is of utmost importance in certain situations.

1. *Evidence of Accomplices*: The conviction of an accused person is possible on the testimony of an accomplice. This is the position both in England and in India. The Indian Evidence Act provides¹⁴:

An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

But generally the courts do not convict on the basis of uncorroborated evidence of an accomplice. This attitude is particularly justified in view of another provision of the Evidence Act which provides that the court may presume that an accomplice is unworthy of credit, unless he is corroborated.¹⁵

2. *Child witnesses*: The position of a child witness may be appreciated in the light of the following provision in the Evidence Act¹⁶:

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

It is obvious, therefore, that a child is a competent witness unless he suffers from any one of the handicaps enumerated above. The courts are generally reluctant to place absolute reliance on the evidence tendered by a child witness and corroboration is required as a rule of prudence.

In the words of Prof. Kenny:

The precaution is wise, for a tribunal of adults may place undue reliance upon such evidence forgetting that, though

14. Section 133.

15. Section 114, Ill. (b).

16. Section 118.

children are less fraudulent than adults, they are often more imaginative. Hence the judge should caution the jury ¹⁷

3. *Sexual offences*: In England corroboration of evidence is essential in certain sexual offences against women and children, and conviction, therefore, is not possible upon the evidence of a single witness. In India, though it is possible to convict an accused person on the uncorroborated evidence of a victim of rape, the courts have nevertheless insisted on corroboration in some cases.

Hearsay Rule—Exceptions

Some exceptions have been recognised to the general rule that hearsay evidence is not admissible. These exceptions are based on necessity since the person making a statement cannot be made to testify in a court of law in certain situations. Out of the various exceptions to the hearsay rule,¹⁸ the one which is of special importance in the administration of criminal justice is as follows:

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding, in which the cause of his death comes into question.¹⁹

The second part of the above provision makes the Indian law different from English where the rule will not apply unless the deceased thought his death to be quite imminent.

This exception to the hearsay rule is usually justified on the ground that the religious awe inspired by the approach of death is deemed fully equal to the sanction of any judicial oath.²⁰

Evidence of the accused's character

In criminal proceedings evidence of the fact that the accused is of a good character is relevant and can be admitted by the

17. *OUTLINES OF CRIMINAL LAW*, Eighteenth Edition, p. 505.

18. Evidence Act, Sections 32 and 33.

19. Section 32(1).

20. *KENNY, op. cit.* p. 510.

court.²¹ But the fact that the accused is of bad character is, by and large, irrelevant. The Evidence Act provides²² :

In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

The explanations are to the effect that evidence of bad character is relevant in a case where bad character is itself a fact in issue and evidence of a previous conviction of the accused is relevant to establish bad character.

This safeguard is to eliminate the possibility of the court getting biased against the accused person on account of his past criminality.

Confessions

A confession is a statement made by an accused person by which he either admits having committed an offence or at any rate substantially all the facts which constitute the offence. The confession made by an accused person is relevant since the presumption is that a man of sound mind and full age will not make a statement against himself. Obviously a confession by a person is the safest kind of evidence provided that it has been made in a voluntary manner. A confession is said to be voluntary when it is made without any inducement, threat or promise. The principle is enacted as follows²³ :

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Confessions made to a police officer or made in police custody are regarded as untrustworthy and hence they are inadmissible.

21. Section 53.

22. Section 54.

23. Section 24.

This rule is meant to curb the tendency of the police personnel to use third degree methods against the persons suspected of committing a crime. Not only are the confessions made to a police officer inadmissible but confessions are also inadmissible when made to any person while the accused person is in police custody, unless it is done in the immediate presence of a magistrate.²⁴

A limited use of the confession made in police custody is however made possible by Section 27 of the Act :

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

For instance an accused person in police custody makes the confession : "After committing murder of X with a knife I threw it on the terrace of X's house." The knife is subsequently recovered from the place indicated by the accused. The admissible part of the confession is "I threw it on the terrace of X's house" since the fact that he knew the knife having been thrown on the terrace of X's house is discovered as a result of this part of the confession. The other part of the confession, "after committing murder" is not admissible.

CRIMINAL PROCEDURE

The procedure to apply the criminal law is laid down in the Code of Criminal Procedure, 1973. While the substantive law defines criminal acts and provides punishments for them, the procedural law inter alia prescribes the manner in which arrests, searches and seizures can be made by the police, the constitution and powers of the criminal courts, the manner in which the various kinds of trial are to be conducted and protections afforded to an accused person.

Rights and protection of the accused

Criminal law and its process cannot be appreciated without some understanding of the rights and protections given to the accused person not only during his trial but also before and after

24. Evidence Act, Section 25.

the trial. These rights and protections aim at providing a fair trial to an accused person so as to eliminate any possible abuse of process resulting in miscarriage of justice. This has to be so since criminal law is expected to maintain certain values in a civilized society and the means to obtain conviction of a guilty person are no less important than getting the conviction itself.

Right to be produced before Magistrate

The police cannot keep a person under arrest for a longer time than is necessary without producing him before a magistrate. There are provisions in the Constitution and the Criminal Procedure Code according to which the maximum time of 24 hours is allowed to the police to produce an accused person before a magistrate.²⁵ These provisions go a long way in guarding the personal liberty of the individual.

Right to Bail

A person is guilty of an offence only after being found to be so by a competent criminal court. Since the processing of a case by the police and the subsequent trial in the court may take a fairly long time, it is desirable that, wherever it is expedient to do so, the accused person must be released on bail since his guilt is yet to be established. Under the scheme of the Code of Criminal Procedure, the offences have been classified into bailable and non-bailable offences.²⁶ While offences which are of lesser gravity are bailable, the more serious offences are non-bailable, the difference between the two categories being that while in the former, bail can be claimed by the accused as a matter of right, bail can be granted in the latter category in the discretion of the court provided that there are no reasonable grounds to believe that the accused is guilty of an offence punishable with death or life imprisonment. Even when the offence is punishable with death or life imprisonment the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person be released.

As regards the amount of bond, the Code provides that the amount of every bond executed shall be fixed with due regard to the circumstances of the case and shall not be excessive.²⁷

25. Constitution of India, Article 22 and Cr. P. C., 1973, Section 76.

26. See First Schedule.

27. Section 440(i).

Right to Counsel and Legal Aid

A person facing trial must have a counsel in order to be defended effectively. The Constitution provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.²⁸ Similarly it has been provided in the Code of Criminal Procedure that any person accused of an offence before a criminal court, or against whom proceedings are instituted under the Code, may of right be defended by a pleader of his choice.²⁹ But the right to engage a counsel is meaningful only if the accused has the means to engage the same. A person too poor to afford a lawyer to defend himself is much handicapped during his trial. It is in this context, therefore, that the importance of legal aid to the indigent is to be appreciated in a poor country like India. Before the enactment of the Code of Criminal Procedure, 1973, there was no right given to an accused person to be provided with a lawyer if he could not engage one himself. The courts did, however, generally provide the services of a lawyer, known as *amicus curiae*, to the persons standing trial for more serious offences. The problem has been taken care of, at least to some extent, by inserting a provision in the Criminal Procedure Code of 1973 which, *inter alia* provides as follows³⁰ :

Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the State.

The State Government may also extend the application of the provision to trials conducted in courts other than sessions courts.

In Britain and the U. S. A. much useful work is done by the legal aid and advice societies. In India a beginning is now being made to provide legal aid to the poor through the legal aid organisations.

28. Article 22(3).

29. Section 303.

30. Section 304.

The Principle of Legality

The fundamental principle of criminal law is that no one can be found guilty of an offence without his having violated some pre-determined law defining a prohibited conduct. The principle is expressed by the maxim, *nullum peona sine lege*. In other words, unless there is violation of some existing law defining a crime clearly and unequivocally, no crime is committed. The Indian Constitution provides³¹:

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than which might have been inflicted under the law in force at the time of the commission of the offence.

The provision manifests what can be called 'great charter of liberty' in countries having rule of law. The position in totalitarian countries is different which can be illustrated with reference to the position obtaining under the Nazi rule in Germany:

Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished according to the law, the basic idea of which fits it best.³²

Presumption of Innocence

There are two systems *i.e.* accusatorial and inquisitorial systems followed in different parts of the world in the administration of criminal justice. In the accusatorial system followed in common law countries, the burden of proving that an accused person violated some law is on the prosecution while in the inquisitorial system which is followed in some European countries like France, it is for the accused person to prove that he is not guilty of the crime allegedly committed by him. In India, where the accusatorial system is followed, there is a presumption in favour of the accused that the offence has not been committed by him and the presumption continues to be operative until the prosecution is

31. Article 20(1).

32. Quoted in 26 Journal of American Institute of Criminal Law and Criminology 847 (1936).

able to prove its case according to the rules of procedure and evidence prescribed by law.³³ The same principle has been incorporated in the Evidence Act.

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.³⁴

The life and liberty of the individuals would be in jeopardy if the rule was otherwise. The principle is sometimes expressed by saying that to be on the safer side, the acquittal of ten guilty persons is to be preferred to the conviction of a single innocent person. A very high standard of proof is, therefore, required to establish the culpability of an accused person. The distinction between the standards of proof in civil and criminal proceedings has been brought about in the following words :

A higher minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. For in the latter it is sufficient that there be a *preponderance* of evidence in favour of the successful, whereas in criminal cases the burden rests upon the prosecution to prove that the accused is guilty *beyond reasonable doubt*.³⁵

The proof beyond reasonable doubt does not, however, imply that the prosecution must eliminate even the fanciful and fantastic doubts regarding the criminality of the accused person. In *Miller v. Minister of Pensions*³⁶, Lord Denning observed :

The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

33. The position in some special laws like the Prevention of Corruption Act may be different due to public policy, and burden is on the accused to free himself from the criminal charge.

34. Section 101.

35. Kenny, *op. cit.*, p. 501.

36. (1947) 2 All ER 372, 377.

Once the prosecution has proved its case, then the burden is on the accused, though his burden of proof is not as exacting as that of the prosecution, to disprove the prosecution case or to prove that the act committed by him is covered by one of the general exceptions provided in the Penal Code. Section 105 of the Evidence Act provides :

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Protection against Self-incrimination

A cardinal principle of the English system of criminal jurisprudence is that an accused cannot be compelled to give evidence against himself. The principle has also been recognised in the Indian legal system. The constitutional guarantee of the right in India is that no person accused of any offence shall be compelled to be a witness against himself.³⁷ The principle is to eliminate the possibility of third degree methods being used against the accused person to extort confession or any other information from him. Some of the provisions in the Evidence Act and the Criminal Procedure Code also seek to achieve similar objectives.³⁸

Protection against Double Jeopardy

It is a well established principle of the English legal system that no man shall be twice punished, if it appears to the court that it is for one and the same cause. The principle is expressed in the well known maxim, *nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*. The principle has been incorporated in the Indian Constitution³⁹ :

No person shall be prosecuted and punished for the same offence more than once.

37. Article 20(3).

38. Evidence Act, Section 20 and Code of Criminal Procedure, 1973 Section 316.

39. Article 20(2).

While the constitutional guarantee recognises only *autrefois convict* (previous conviction) as a bar to the subsequent prosecution for the same offence, the provision in the Criminal Procedure Code incorporates *autrefois acquit* (previous acquittal) as well to bar another trial for the same offence. The main principle laid down is that a person who has once been tried by a competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence.⁴⁰

The same act committed by a person may amount to two different offences *i.e.* the same act may invite the application of the definitions of two distinct offences and the protection against double jeopardy is not available in such situations. The offences are distinct if their ingredients are different and it makes no difference that the allegation of fact is the same in both the cases.⁴¹

CRIMINAL COURTS IN INDIA

For a discussion of the trials in criminal courts some acquaintance is necessary with the constitution and powers of the courts in India. There are four classes of criminal courts created under the Criminal Procedure Code. Besides these courts, the Supreme Court and High Courts, which are the creation of the Constitution, wield wide powers in criminal matters. High Courts have also been given original as well as appellate jurisdictions under the Code of Criminal Procedure.

Court of Sessions

These are established by the State governments, one each for each session division in the State but the appointment of the sessions judges is made by the High Courts in order to maintain the independence of the Judiciary. Additional and Assistant Session Judges may also be appointed by the High Courts.

Like the High Courts, the Sessions Judges and Additional Sessions Judges can pass any sentence authorised by law but any sentence of death passed by them is subject to confirmation by

40. Section 300.

41. For a detailed discussion see *State of Bombay v. S. L. Apte*, AIR 1961 C 578 : (1961) 1 Cri LJ 725.

the High Court. An Assistant Sessions Judge cannot award death sentence or imprisonment exceeding ten years.

Judicial Magistrates

In every district of non-metropolitan areas the State government may appoint any number of judicial magistrates of the first class and second class after consultation with the High Court. One judicial magistrate of the first class in each district shall be appointed by the High Court as the Chief Judicial Magistrate. The High Court may also appoint any first class judicial magistrate as Additional Chief Judicial Magistrate and he shall have the same powers as those of Chief Judicial Magistrates.

Section 29 of the Code lays down the sentences which can be passed by the magistrates :

1. The court of Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

2. The court of a magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees, or of both.

3. The court of a magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.

In metropolitan areas the courts of metropolitan magistrates are established. The High Court also appoints Chief Metropolitan and Additional Metropolitan Magistrates. Any district or town whose population exceeds one million may be notified to be a metropolitan area by the State Government. The jurisdiction and powers of every metropolitan magistrate shall extend throughout the metropolitan area. The powers of the court of a Chief Metropolitan Magistrate are the same as those of Chief Judicial Magistrate and a metropolitan magistrate enjoys the powers of the court of a magistrate of the first class.

Executive Magistrates

In addition to the judicial magistrates, executive magistrates are also appointed by the State Government in each district. One

of the executive magistrates is appointed as the District Magistrate and all the executive magistrates except Additional District Magistrates are subordinate to him. The executive magistrates are not controlled by the High Court and are from the executive branch of the Government. The executive magistrates are generally assigned to deal with certain provisions of the Criminal Procedure Code like those relating to preventive action, disputes relating to immovable property and situations created by public nuisances and breach of peace.

Procedure—Crime to Conviction

A crime committed may be either cognizable or non-cognizable depending upon the gravity attached to it in the scheme of the Criminal Procedure Code. Cognizable offences are graver offences compared to the non-cognizable offences and in such cases a police officer may arrest without warrant which is not possible in offences falling in the other category.⁴² While in cognizable offences investigation may be commenced by the police on their own initiative, they cannot investigate a non-cognizable case without the order of a magistrate having power to try such case or commit the case for trial.⁴³ Police officers authorised to investigate into the commission of an offence are empowered to examine orally any person supposed to be acquainted with the facts and circumstances of the case.⁴⁴

Generally speaking a search warrant from a magistrate is needed to enable a police officer to effect searches and seizures of the premises or of the incriminating materials suspected to be connected with the crime but in appropriate cases the police officer may go ahead with search and seizure even without warrant.⁴⁵ The procedure of search and seizure is elaborately provided in the Criminal Procedure Code.⁴⁶

If the investigation leads the officer in charge of the police station to believe that there is sufficient evidence to indicate a

42. First Schedule of the Code.

43. Sections 155, 156.

44. Section 161.

45. Section 165.

46. Section 100.

reasonable case against the accused person, the officer shall forward the accused to the magistrate empowered to act under the Code. In the absence of sufficient material against the person, he is to be released by the police.

Cognizance by Magistrate

A magistrate empowered under the Criminal Procedure Code may take cognizance of an offence in one of the three ways⁴⁷:

- (i) upon receiving a complaint of facts which constitute such offence;
- (ii) upon a police report of such facts;
- (iii) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

The magistrate taking cognizance of the offence may dismiss the proceedings after preliminary enquiry if there appears to be no good reasons to proceed with the case.⁴⁸ Otherwise the magistrate issues a summon or a warrant to the accused for his appearance before him.⁴⁹ If the case is exclusively triable by the sessions judge, the magistrate has to commit the accused to the sessions court.

Trial of the accused person

Four modes of trial are provided in the Code, *viz.* trial before a court of session, trial of warrant cases by magistrate, trial of summons cases by magistrate and summary trials.

As discussed earlier, the sessions court has to try the more serious offences. In warrant cases triable by the magistrate, an elaborate procedure, almost the same as in sessions court is followed while summons cases are disposed of by following a simpler and shorter procedure. Summary procedure is almost the same as the procedure for the summons cases and is to be followed in all summons cases and a few other offences.⁵⁰

47. Section 190.

48. Section 203.

49. Section 2 (x) defines warrant cases as those which are punishable with two or more than two years' imprisonment. Others are summons cases.

50. Section 260.

A trial in a sessions court is always conducted by the public prosecutor. The starting point of the trial is the presentation of the case against the accused by the prosecutor. The Sessions Judge has to consider whether there are sufficient grounds for proceeding against the accused after perusing the record and submissions, if any, of the accused. If the judge forms the opinion that there are no sufficient grounds for proceeding against the accused, he shall then discharge the accused after giving the reasons for his action. Otherwise if there are grounds, charges shall be framed against the accused. A charge is an accusation containing all the relevant details about the offence allegedly committed by the accused. Without a proper charge the accused would not be in a position to defend himself in an effective manner. If the accused pleads guilty to the charge, the judge may convict him accordingly. In case he does not, a date is fixed for hearing the prosecution's evidence and the accused has the right to cross-examine the witnesses for the prosecution. If at this stage the judge is of the view that there is no evidence to support the prosecution, the accused shall be acquitted. If the judge finds that there is some worthwhile evidence against the accused and, therefore, no order of acquittal is passed, the accused is to be called upon to enter on his defence. When the defence case has been heard the prosecutor sums up his case to which the defence lawyer has the right to reply. The judge shall give a judgment in the case after hearing the arguments and points of law. In case of conviction the judge may either pass an order of probation under Section 360 of the Code or award him any punishment authorised by law. The judge, however, shall have to give a hearing to the accused on the question of sentence.

The trial of a warrant case by a magistrate proceeds almost on the same lines as described above. The procedure in summons cases is however, different in a number of ways. In warrant cases, charge is framed against the accused person if a *prima facie* case is made out against him. In summons cases, the particulars of the offence are stated to the accused when he appears before the magistrate. He is asked whether he pleads guilty and in case he does, a summary conviction may follow. In summons cases, prosecution evidence is recorded only if the accused does not plead guilty, while in warrant cases, it is only after the evidence of the prosecution has been given and a charge is framed that the accused is questioned about his guilt.

Chapter X

THE SENTENCING PROCESS

The object of a criminal trial is to determine whether the accused person is guilty of the offence he is charged with and to prescribe suitable action in relation to him if proved guilty on the basis of an elaborate system of substantive and procedural criminal law. The determination of the second issue, *i. e.*, the choice of an appropriate sanction out of the many permitted by law in a particular situation is of as enormous consequence to the individual offender as it is to the society at large. While the offender's life, liberty or property and his entire future hinge on the outcome of the sentencing process, it is also bound to have some impact on the social interests, which ought to be the primary concern of the criminal law machinery. As discussed earlier, various means of sanction like fine, imprisonment, probation and sometimes the extreme punishment of death are available to the courts under the provisions of law governing a particular kind of offence or offender. The sentencing process involves the determination of the appropriate action both in qualitative and quantitative terms.

The significance of the sentencing process is to be appreciated in the context of individualization in the administration of criminal justice. Individualization means that instead of fitting the offence, the criminal sanction should fit the offender. The first movement towards rational sentencing was launched by the English Classical School as a reaction against the arbitrary nature of the punishments prescribed for a variety of offences. In eighteenth century England, over 200 crimes, ranging from pick-pocketing to murder were punishable with death sentence. In other words, far from fitting the offenders, the punishments did not fit even the offences. Bentham sought to achieve some element of rationality in the penal policy by advocating punishments

of different magnitudes for different kinds of offences. He provided the following guidelines for the gradation of offences in terms of different punishments :

1. That the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.¹
2. When two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.²
3. The punishment should be adjusted in such manner to each particular offence, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.³
4. The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.

The other rules propounded by Bentham laid down that the quantum of punishments prescribed should be in inverse proportion to the possibility and time factor involved in the infliction of punishment. In other words punishment ought to be greater in situations where detection of the offence and the consequent punishment is either uncertain or remote in terms of time.

Regarding the fixation of punishment in the range permissible by law, Bentham said that the quantum should vary according to the offender's capacity to suffer. He then enumerated thirty-two variables of capacity for suffering ranging from sex, age, physical and mental health to climate, religion and lineage which, in the words of Nigel Walker, was an astonishingly modern piece of writing for an eighteenth century penologist.

The classical school, therefore, paved the way for distinguishing the various crimes according to their gravity and the

1. The expression 'profit of the offence' according to Bentham, includes every advantage, real or apparent, providing motivation for the commission of an offence.
2. A thief would prefer to commit theft without murder if there is a big gap in the quantum of punishments for the two offences.
3. Punishment for stealing a smaller amount of money should be less than that for a relatively higher sum.

prescription of different punishments for them. The Indian Penal Code is an example of the influence exercised by Benthamites in relation to penal legislation in the nineteenth century and afterwards in various countries.

The grading of the various offences is based on their gravity as understood by the legislature; and the gravity of an offence is generally assessed in terms of social danger, alarm, social disapproval, harm and wickedness involved in it.⁴ This can be illustrated with a few examples from English and Indian statutory provisions.⁵

1. *Social Danger*.—Receiving stolen property is punishable with longer punishment than the one provided for theft.⁶ This is because of the greater social danger posed by the professional receivers of stolen property as compared to ordinary thieves. In terms of wickedness, the two offences appear to be of the same magnitude. Similarly while the maximum punishment for ordinary cases of criminal breach of trust under the Indian Penal Code is three years, it is seven and ten years when breach of trust is committed by a public servant or a banker respectively.⁷ Again the punishment for criminal intimidation is higher in certain situations like a threat to impute unchastity to a woman.⁸

2. *Alarm*.—The gravity of an offence is also determined with reference to the alarm it causes in the society. Burglary, therefore is treated more seriously than theft.⁹ This is necessary in view of what has been called “vindictive satisfaction” by Bentham as well as on grounds of general deterrence. One of the reasons for punishing unsuccessful attempts to commit crimes is that though the intended harm is not caused, some alarm is caused to the potential victim and others.

4. See Rupert Cross : THE ENGLISH SENTENCING SYSTEM, 1971, p. 139.

5. These factors are also considered, as will be seen later, by the court in sentencing.

6. In India the punishment however is the same for the two offences. See I. P. C., Sections 379 and 411.

7. I. P. C., Sections 405, 407, 408 and 409.

8. I. P. C., Section 506.

9. I. P. C., Section 454.

3. *Social Disapproval*.—This element is the basis of certain sexual offences and also of the differential punishments for different types of sexual offences. While a heterosexual intercourse is punishable only if it is against the will or without the consent of the victim or if the victim is below a certain age, a homosexual act is punishable irrespective of the age factor or whether the person concerned consented or not.¹⁰ It is also significant that a husband committing rape on his minor wife is treated quite indulgently by the law.¹¹ The legislative attitude can be demonstrated by the fact that under the Sexual Offences Act, 1956 of England, an indecent assault upon a woman is punishable with a maximum of two years' imprisonment, whereas indecent assault upon a male is punishable with ten years as a result of increase in the maximum punishment by the Sexual Offences Act, 1967.¹² Finally, in India, illicit relationship with a married woman is punishable but a situation where the man is married and woman unmarried is not punishable as such.

4. *Harm*.—This is one of the factors to be considered in the sentencing policy by the legislators and the judges. The offences against person like murder, grievous hurt and simple hurt are punished differently under the Indian Penal Code. Attempt to commit an offence involves the same wickedness on the part of the offender as in the case of the successful commission of the crime but attempts are punished with lesser penalties since lesser or no harm is caused in unsuccessful attempts.¹³

5. *Wickedness*.—Though the harm produced by two different offences may be the same, yet the offence involving greater wickedness should carry greater punishment. For instance, while the offence of murder is punishable with death or life imprisonment, death caused by rash or negligent act is punishable with only two years' imprisonment.¹⁴ Dishonest acquisition of property through cheating is treated as a more serious offence than theft. While the maximum punishment for the former is 7 years, it is only three years for the latter.¹⁵

10. I. P. C., Sections 376, 377.

11. Section 376.

12. Rupert Cross, *op. cit.* p. 141.

13. I. P. C., Section 511.

14. I. P. C., Sections 302 and 304-A.

15. I. P. C., Sections 379 and 420.

It should not, however, be concluded from the above discussion that the quantum of punishments for various offences is invariably based on highly scientific or rational considerations. Before its revision in 1965, the New York penal law provided a maximum of two years for abandonment of children and compounding a crime but three years for injury to domestic animals and misconduct of election officials. It was apparently this kind of irrationality that led a critic to make the following observations¹⁶ :

No branch of penal legislation is, in my view, more anarchical than that which deals with prison terms that may or sometimes must be imposed on conviction of specific crimes. The legislature typically makes determination of this order not on any systematic basis but rather by according its ad hoc attention to some discrete area of criminality in which there is a current hue and cry. Distinctions are thus drawn which do not have the slightest bearing on the relative harmfulness of conduct and the consequent importance of preventing it so far as possible, on the probable dangerousness of the individual whose conduct is involved, or even on a public demand for heavy sanctions which is so inexorable that it cannot safely be denied. What dictates legislation is the simple point of politics that re-election demands voting against sin, whenever ballots on the question must be cast.

Prescribing sentences for various offences is a legislative function and courts in England and India cannot question the wisdom of the legislatures even if the sentences appear to them to be unreasonable or excessive. The courts can exercise their discretion in such cases in fixing the appropriate punishment where maximum penalties have been provided but they cannot but be helpless in situations where minimum sentences are laid down. The courts in the U. S. A., however, have the power to strike down a punishment as unconstitutional if it is 'cruel and unusual' violating the Eighth Amendment of the Constitution. *Watson v. U. S.*¹⁷ is an example. The appellant was convicted under a law which provided a minimum of ten years' imprisonment for being in possession of narcotics. The Court of Appeals held the punishment of ten years to be cruel and unusual and in violation of the Eighth Amendment. The court observed :

. The imposition of a statutory minimum, denying the defendant the benefit of any special equity or mitigating

16. Wechsler, 109 Pennsylvania Law Review 465, 472.

17. U. S. Court of Appeals, District of Columbia, 1968.

circumstances which would otherwise result in a lighter sentence, is itself a mark of unusual severity. And we note that, at least on the record before us, this appellant has numerous special equities and mitigating circumstances in his favour. Nor is this all. The general federal rule permits the court to suspend all or part of a sentence imposed for any offence not punishable by death or life imprisonment. Moreover, most criminals are eligible for parole after serving one-third of their terms. But Congress has made a special exception for narcotic offenders, denying them either probation or parole.

The result of this sentencing scheme is that a convicted murderer, kidnapper, arsonist, rapist, traitor, robber or saboteur may receive a lighter sentence than is mandatorily imposed on an addict who possesses narcotics more than once. And all these dangerous felons may be eligible for release before the hapless addict if they are sentenced to any term less than thirty years. . . . We do not dispute Congress's right to set minimum prison terms. . . . But we think any judgment that mere possession of unstamped narcotics to meet a compelling personal need is a more heinous offence than many murders, arsons, rapes, or kidnappings would be arbitrary and capricious. The only plausible justification for punishing such possession more severely is that, though less serious, it is harder to deter. But that rationale, while entitled to consideration, cannot support a penalty out of all proportion to the offence or to the culpability of the offender.

Primary and Secondary Decisions

The first issue which a court has to decide after finding an accused person guilty is to determine as to whether the offender needs to be dealt with through 'individualization' or by penal sanctions. The term 'individualization' includes in this context preventive as well as rehabilitative measures, an approach different from the concepts of retribution and general deterrence. After making the choice between the two conflicting approaches, the court has to select the appropriate mode out of the available devices in the particular approach. If the choice made is 'individualization', the further issue is to choose between alternatives like probation and suspended sentence. If the punitive approach is chosen, the alternatives available are fine, imprisonment or death sentence in the extreme cases. It is obvious that in case of the imposition of imprisonment or fine, the quantum of the sanction

shall also have to be fixed. The various parts of the sentencing decisions are referred to as the primary and secondary decisions.¹⁸

Individualization of sentence has been the leading tendency in sentencing in the contemporary period. Writing about England, D. A. Thomas observes¹⁹ :

... As late as 1932, the Departmental Committee on Persistent Offenders could describe sentencing behaviour almost entirely in terms of a tariff system. By 1961, the Streatfield Committee saw a changed picture, the courts had increasingly come to consider the offender as an individual, whose needs, rather than whose guilt, would form the basis of the sentence passed.

Similar developments have occurred in many countries including India and the U. S. A. in varying degrees.

Pre-sentencing Enquiry

It is evident that the sentencing authority must have sufficient information regarding the various personal factors of the accused if the primary and secondary decisions are to proceed on any scientific premises. The need for making detailed information about the offender available to the court has therefore been felt in all the modern penal systems. The significance and importance of the pre-sentence report has been described by Sheldon Glueck thus²⁰ :

A pre-sentence investigation is helpful even if one clings to the conviction that the chief aim of the criminal law is painful punishment with a view to general and specific deterrence; all the more necessary it is if one believes its main objective to be the reform and the rehabilitation of the offender.

Not only is the pre-sentence report valuable as a basis for sentence and treatment in the individual case but the accumulation and study of many pre-sentence reports can lead to a realistic, rather than a merely theoretical, re-examination of the entire philosophy of punishment.

18. Thomas : *PRINCIPLES OF SENTENCING*, Heinmann, London, 1970.

19. *Ibid.*

20. 41 *Journal of Criminal Law and Crime* 717.

The courts not only receive and use the information given in the reports but they may also seek advice from experts like psychiatrists or probation officers regarding the desirability of a particular sentence keeping in view its likely impact on the offender. The information is of special significance in case of juvenile offenders and some of the related issues have been referred to in the chapter dealing with juvenile delinquency.

Nigel Walker emphasises the value of the pre-sentencing reports to bring home the point that the courts trying and finding an accused person guilty are not necessarily the sole instruments of doing the sentencing job as well.²¹

Quite apart from the actual value of the information and advice, this trend is healthy, because it means a departure in practice from the legal convention that the disposal of the offender is the sole responsibility of the persons who preside over the trial of his guilt.

The Congress of the International Penal and Penitentiary Commission in Brussels held in 1951 recognised the utility of pre-sentencing reports and some of the resolutions reproduced below indicate the scope and content of such reports likely to be helpful in the sentencing process :

1. In the modern administration of criminal justice, a pre-sentence report covering not merely the surrounding circumstances of the crime but also the factors of the constitution, personality, character and socio-cultural background of the offender is a highly desirable basis for the sentencing, correctional and releasing procedures.
2. The scope and intensity of the investigation and report should be adequate to furnish the judge with enough information to enable him to make a reasoned disposition of the case.
3. In this connection it is recommended that criminologists in various countries conduct researches designed to develop prognostic methods ("prediction tables", etc.)²²

21. Nigel Walker, *op. cit.* p. 97.

22. For a discussion of prediction tables see chapter on Probation.

4. It is further recommended that the professional preparation of judges concerned with peno-correctional problems include training in the field of criminology.

The pre-sentence reports are now a regular feature of the English and American criminal law systems. In the U. S. A. the various States have enacted laws for the supply of these reports and they have also been the subject-matter of the constitutional issues arising due to the requirement in many jurisdictions that the reports must be kept confidential. In England, the Home Office has powers since 1967 to require any kind of criminal court to obtain a 'social inquiry report' before imposing a custodial sentence on whatever category of offender the Home Office may prescribe. In India, however, there is no such provision in the laws relating to the administration of criminal justice except those relating to juvenile offenders. The issue was considered by the Indian Jail Committee which opposed the kind of arrangement as in the U. S. A. in view of the peculiarities of the Indian context in the following words²³ :

Objection to this is that apart from duplication of the work which it involved, it would be too early to judge the effect of conviction and of the yet unpronounced sentence on the accused. In some States of America an attempt has been made to get over this difficulty by appointing in every court an officer whose duty it is after the previous guilt has been established to make enquiries and to furnish the judge with information including a report on his mental condition which will enable to award punishment wisely and equitably. The system is said to work satisfactorily in the U. S. A. although even there it was admitted attempts had been made, though unsuccessful, to influence the courts' officers in favour of or against the prisoner. In this country we do not think that such a system would have any chance of success. The many religious and social cleavages which exist in India would inevitably lead to an unevenness in the officers' reports even if direct corruption could be guarded against, and we do not think that it would be wise to imitate the American system in this respect. At the same time, it does seem possible that more might be done specially through the instrumentality of the public prosecutor, generally a vakil of long standing and position to lay before the court, after the question

23. Quoted in Kripal Singh Chhabra : *QUANTUM OF PUNISHMENT IN CRIMINAL LAW IN INDIA*, 1970, p. 179.

of the prisoner's guilt has been determined, such reliable information as would enable the court to adjust its sentence to the needs of the case.

It is evident that the views expressed by the committee in terms of 'religious and social cleavages' are a bit obsolete now though there might have been a lot of truth in it when the report was submitted more than half a century ago. Certainly the arguments based on the abuse of authority may be advanced even in the case of court personnel including judges and public prosecutors. In any case the committee did not deny the potential utility of the pre-sentence reports.

In the absence of any pre-sentence reports, courts in India have to fix the punishments on the basis of whatever inadequate information they receive about the offender in the course of the actual trial. The Supreme Court has lamented more than once over this kind of unsatisfactory state of affairs. In *P. K. Tejani v. M. R. Dange*²⁴, Justice Krishna Iyer observed :

Finally comes the post-conviction stage where the current criminal system is the weakest. The court's approach has at once to be socially informed and personalised. Unfortunately, the meaningful collection and presentation of penological facts bearing on the background of the individual, the dimension of damage, the social milieu and what not—these are not provided for in the Code and we have to make intelligent hunches on the basis of materials adduced to prove guilt. . . .

Referring to the lack of opportunities for the consideration of sentencing issues in the trial courts, the Supreme Court observed in *Ramashraya Chakravarti v. State of M. P.*²⁵ :

Trial Courts in this country already overburdened with work have hardly any time to set apart for sentencing reflection. This aspect is missed or deliberately ignored by the accused lest a possible plea for reduction of sentence may be considered as weakening his defence. In a good system of administration of justice, pre-sentence investigation may be of great sociological value.

24. (1974)1 SCC 167 : 1974 SCC (Cri) 87.

25. (1976) 1 SCC 281 : 1976 SCC (Cri) 1.

Under the new Criminal Procedure Code of 1973, the sessions courts and the magistrates trying warrant cases have to give hearing to the accused on the question of sentencing after finding him guilty of the offence.²⁶ Though the system based on pre-sentence reports is yet to come, the new provisions may at least give some scope to the sentencing issues in the criminal courts in India.

The Primary Decision—Illustrative Cases

The determinants of the judicial attitude can be understood with the help of some decided cases. As discussed earlier, gravity of the offence is reflected in the severity of punishments prescribed by the legislature. The same factors *e.g.* alarm, harm, wickedness and public disapproval have an impact on judicial attitude as well. Grave offences like rape and robbery have generally been dealt with by deterrent sentences. Prevalence of a crime at a time in a local area warrants more strict attitude on the part of the courts.

Young age is certainly an important factor in deciding in favour of rehabilitative treatment but here also the courts cannot afford to ignore other factors involved in the case. Three offenders of young age were found guilty of having sexual intercourse with a group of school girls who were "bored and desperate for some form of excitement" and "sexual adventures became the vogue amongst them". Eighteen girls and forty youths were found involved in these 'sexual adventures'. The court opted for deterrent sentence despite the young age of the offenders since the episode in its opinion must have caused 'grave disquiet in the locality concerned where this is going on, on a whole scale'.²⁷

In a case where a boy of 14 years was found guilty of murder of a boy who did not accept his proposal for unnatural intercourse with him, it was held by the Madhya Pradesh High Court that not only that the Reformatory School Act did not operate in murder cases,²⁸ but even otherwise a youthful offender convicted of murder should not ordinarily be sent to the reformatory schools.

26. See Sections 235 and 248.

27. Murphy, Galloway and Shinn, 1964 Cr LR 486.

28. Earlier there was difference of opinion between the two judges who heard the appeal in the first instance on the question of applicability of the Act in murder cases.

The Court held that it was more so when the conduct besides being extremely cruel, exhibits great depravity. It was also pointed out that it was implicit in the rules framed by the State Government under the Act that boys habituated to committing unnatural offences should not be sent to the Reformatory Schools.²⁹

On the other hand, a young man of twenty years was found guilty of an offence under Section 380 of the Indian Penal Code for committing theft of a bicycle and a few clothes. The factors, which weighed with the court in releasing him after admonition under Section 3 of the Probation of Offenders Act, 1958, were that there was no previous conviction to the credit of the accused and the theft was committed on a sudden temptation without any prior planning or design on the part of the accused person.^{29a}

Though the Supreme Court refused to apply the provisions of the Probation of Offenders Act, 1958 in case of a person found guilty of an offence under the Prevention of Food Adulteration Act³⁰ because of 'imperatives of social defence and the improbabilities of moral proselytisation', it appears that the court is not always averse to probation in such offences. In a later case³¹ the benefit of probation was given on the ground that the conviction was based on an offence committed many years before the disposal of the appeal by the Supreme Court. The appellant was found guilty of an adulteration offence committed in 1965 and the Assistant Sessions Judge ordered release under Section 4 of the Probation Act. The order of probation was quashed by the High Court. The Supreme Court accepted the appeal against the High Court's order holding that it was not proper to send the appellant to jail in view of the fact that the offence was committed a long time back.

The English courts have frequently shown extreme liberality in granting probation to persons whom D. A. Thomas refers to as 'intermediate recidivists'.³² These recidivists, according to him,

29. *Ganga Ram Raghu Nath v. State of M. P.*, AIR 1965 MP 122.

29a. *Suna v. State*, AIR 1967 Ori 4.

30. *Tejani v. Dange*, (1974) 1 SCC 167 : 1974 SCC (Cri) 87.

31. *Ghanshyam Das v. Municipal Corporation of Delhi*, (1975) 4 SCC 821 : 1975 SCC (Cri) 774.

32. *Op. cit.*, p. 20.

are persons between the ages of twenty and forty who have a number of previous convictions and a corresponding experience of institutional life but still there is some chance of rehabilitation as suggested by the presence of some special circumstances brought to the notice of the court by a probation officer. In a case cited by Thomas, a man of twenty-nine with a number of previous convictions and sentences of imprisonment pleaded guilty to house-breaking and factory breaking, committed on the day of his release from prison. The probation officer reported that there was a real chance of the person's rehabilitation since a job and a place of residence could be found for him. The court accepted the recommendations of the probation officer.

The attitude of the Indian courts in comparison appears to be extremely cautious as illustrated by the following two cases. The appellant was arrested in 1971 while moving in a local train in suspicious circumstances but was released on a bond of good behaviour in the sum of Rs. 100. Subsequently she was convicted for the theft of a gold necklace and was sentenced to 18 months' rigorous imprisonment and a fine of Rs. 500 or 6 months' imprisonment in default of payment of fine. The appellant stated before the probation officer that she had committed similar thefts on two or three other occasions but those thefts went undetected. The Supreme Court held that though at the relevant time she was under 21 years of age, it was not a proper case for probation having regard to the nature of the offence and character of the appellant.³³

The decision in *Uttam Singh v. State (Delhi Administration)*³⁴ is certainly of debatable nature. The appellant was convicted under Section 292 I.P.C. for being in possession, for the purpose of sale, three packets of playing cards with obscene photographs and sentenced to six months' rigorous imprisonment and a fine of Rs. 500. The Supreme Court refused to interfere with the sentence on the following grounds :

The accused is married and is said to be 36 years of age. Having regard to the circumstances of the case and the nature

33. *Kamroonissa v. State of Maharashtra*, (1975) 3 SCC 272 : 1974 SCC (Cri) 880.

34. (1974) 4 SCC 590 : 1974 SCC (Cri) 626.

of the offence and the potential danger of the accused's activity in this nefarious trade affecting the morals of the society, particularly of the young, we are not prepared to release him under Section 4 of the Probation of Offenders Act. These offences of corrupting the internal fabric of the mind have got to be treated on the same footing as the cases of food adulterations and we are not prepared to show any leniency

It is not very clear but it appears from the above observations as if the fact of the appellant being married had also an adverse effect on his sentence which is a bit intriguing. The comparison between offences relating to obscenity and adulteration also seems to be somewhat misplaced. While the direct effects of adulteration of food are absolutely clear and hence predictable, the same cannot probably be said regarding the impact of the obscene photographs in objective terms.

The Secondary Decision

After the primary decision is made, the court has to apply its mind to choose one of the alternatives available in the selected approach *i.e.* individualization or punitive approach. The various individualized approaches have been discussed in chapters relating to probation, parole and juvenile delinquency and now an assessment of the principles of sentencing in the punitive method may be made.

The possible modes of punishments in countries like India, where capital punishment has not yet been abolished, are capital punishment, imprisonment including life term, and fine. The death sentence being permissible in extremely serious cases only, the more common modes are imprisonment and fine. The fixation of quantum of punishment is an important part of the sentencing process.

Capital Punishment

The framers of the Indian Penal Code were of the view that the capital punishment ought to be used sparingly. The position of capital punishment in the Penal Code has not changed as such in more than hundred years of its existence but the trend in the direction of the abolition of capital punishment in many countries has affected the legislative as well as judicial thinking on the subject. The legislative thinking is reflected in some subtle changes

in the Criminal Procedure Code during the last two decades or so. Before the amendment of the Criminal Procedure Code of 1898 in 1955 it was obligatory for a court to give reasons for not awarding death sentence in a case of murder. The amendment of 1955 did away with the requirement of assigning reasons for not giving death sentence in an appropriate case. Under the new Criminal Procedure Code of 1973 now the court has to record reasons for awarding death sentence. It is evident that the provisions regarding death sentence have gradually been liberalised in favour of the guilty persons.

The liberal judicial attitude has also been responsible to a great extent for the gradual reduction of capital sentence in the recent past as will be evident from the following discussion.

To begin with it may be worthwhile to take note of certain general principles which have emerged in relation to capital punishment in India. They may be summed up as follows :

1. Brutality involved in a murder as an aggravating factor may indicate capital punishment.
2. A murder after due premeditation and planning may call for death sentence.
3. Provocation given by the deceased to the offender even if not sufficiently 'grave and sudden' to reduce the offence to culpable homicide not amounting to murder under Exception 1 to Section 300 of the I. P. C. may still be treated as a mitigating circumstance to warrant life imprisonment in preference to death sentence.
4. Murder committed on the spur of a moment where no enmity between the convict and the deceased is involved may not be punished with death. Such cases are not necessarily covered otherwise by Exception 4 to Section 300, I. P. C. which reduces the offence of murder to culpable homicide not amounting to murder punishable with life imprisonment or imprisonment upto ten years. Irresistible impulse has also been accepted as a mitigating factor.^{34a}

^{34a}. *Gulab Souba v. State of Maharashtra*, (1971) 3 SCC 931 : 1972 SCC(Cri) 179.

5. Age or sex itself is not generally enough to reduce the sentence of death to life imprisonment though there are some cases where youth of the offender has been accepted as a mitigating factor.³⁵ The Indian Penal Code (Amendment) Bill, 1972, contains the following provision :

The sentence of death shall not be passed on a person convicted of a capital offence if at the time of committing the offence he was under eighteen years of age and death is not the only punishment provided by the law for the offence.³⁶

6. If an appeal is made against the conviction for murder to the High Court and the judges agree on the question of guilt but differ on sentence, it is usual not to impose the death penalty unless there are compelling reasons for the extreme punishment.³⁷
7. Another factor which has sometimes been accepted as one of the mitigating circumstances is the delay involved in the final disposal of the case by the appellate courts. The reason advanced is that the mental torture caused to the convict due to the death sentence hovering over him for a long time may be considered as a mitigating factor. A possible criticism is that delay in the disposal of the appeal depends upon a number of fortuitous circumstances linked with the legal process, and, as such, have no relevance to the question of death sentence. The Supreme Court has said in a recent case that the value of such delay as a mitigating factor depends upon the features of a particular case. The court observed that the issue cannot be divorced from the diabolical circumstances of the crime itself.³⁸

Some of the abovementioned principles can be illustrated with decisions of the Supreme Court. In a case the appellant attempted on various occasions to have illicit relationship with the deceased,

35. See AIR 1957 All 177. See also the general observations by the Supreme Court on capital punishment in (1974) 4 SCC 413 : 1974 SCC (Cri) 479 where it was said that where the murderer is too young or too old, the clemency of penal justice helps him.

36. Clause 20.

37. *Pandurang v. State of Hyderabad*, 1955 Cri LJ 572.

38. *Lajar Masih v. State of U. P.*, (1976) 1 SCC 806 : 1976 SCC (Cri) 195.

his former beloved, after her marriage to another person. This was naturally resented by her husband and other members of the family. The appellant attacked the deceased and three other unarmed persons while they were sleeping in their house. The Supreme Court upheld the death sentence on the following grounds :

The conduct of the appellant in attempting to disrupt the matrimonial home of the deceased was highly immoral and cannot be looked upon with commiseration, particularly when after her marriage the deceased had returned to the path of rectitude and was firmly faithful to her husband. Again the crime was committed in a dastardly fashion. No less than four unarmed persons were indiscriminately stabbed when most of them were lying asleep, unawares and helpless. The crime was premeditated and preplanned. Melhu's injury was dangerous to life. But for timely medical aid, the injury would have proved fatal.³⁹

*Bishan Das v. State of Punjab*⁴⁰ is another case where the Supreme Court refused to interfere with the award of death sentence on the appellant because the murder was committed in an extremely dastardly and cruel manner. The Court observed :

. . . We are aware that the general trend in courts and among jurists as well as penal codes in this country and other countries is towards abolition of capital punishment. Indeed we had occasion to consider the matter in some detail in *Ediga Anamma v. State of A. P.*⁴¹ where we have pointed out how the draft Bill before the Parliament revising the Penal Code leans towards the more humane alternative of the two punishments prescribed for murder. However, a Bill is not law nor are we disposed to interfere with the punishment inflicted.

The trend is clearly towards the abolition of death sentence and it appears that at present death sentence is being allowed only in cases where there is not the slightest trace of any extenuating circumstances. The Supreme Court observed in *Ediga Anamma* :

While murder in its aggravated form in the extenuating factors connected with crime, criminal or legal process, still is condignly visited with death penalty, a compassionate alternative of life imprisonment in all other circumstances is gaining judicial ground.

39. *Lajar Masih v. State of U..P.*, (1976) 1 SCC 806 : 1976 SCC (Cri) 195.

40. (1975) 3 SCC 700 : 1975 SCC (Cri) 145.

41. (1974) 4 SCC 443 : 1974 SCC (Cri) 479.

In fact the decisions in the above case and in *Raghubir Singh v. State of Haryana*⁴², represent the high watermark of judicial clemency in India in the context of capital punishment. In both the cases Justice Krishna Iyer commuted the death penalty of sex-stricken persons to life imprisonment in spite of the fact that in both the cases the criminals showed criminality of a high order and the murders were the result of treachery, planning and deep premeditation; one case being of double murder. It would not be out of place to take detailed note of the judgments in the two cases.

In *Ediga Anamma v. State of A. P.*⁴³, the appellant was convicted of double murder, of a woman and her tender child because of the jealousy generated by the fact that the deceased woman had developed amorous relationship with the same man, a widower, with whom the appellant had already been carrying on an affair. The stabbing of the two persons was planned and ghastly in nature and careful steps were taken to destroy the evidence by attempting to burn the body of the deceased woman. The Supreme Court made the following observations to justify its preference for life imprisonment to capital sentence :

We assume that a better world is one without legal knifing of life, given propitious social changes. Even so, to sublimate savagery in individual or society is a long experiment in spiritual chemistry where moral values, socio-economic conditions and legislative judgments have a role. Judicial activism can only be a signpost, a weathervane, no more. We think the penal direction in this jurisprudential journey points to life prison normally, as against guillotine, gas chamber, electric chair, firing squad or hangman's rope. "Thou shalt not kill" is a slow commandment in law as in life, addressed to citizens as well as to States, in peace as in war.

Let us crystallise the positive indications against death sentence under the Indian law currently Where the murderer is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is possible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary

42. (1975) 3 SCC 37 : 1974 SCC (Cri) 733.

43. (1974) 4 SCC 443 : 1974 SCC (Cri) 479.

features in the judicial process such as the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Likewise if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302 read with 149, or again the accused has acted suddenly under another's instigation without premeditation, perhaps the court may humanely opt for life imprisonment, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accepting the trend against the extreme and irrevocable penalty of putting out life.

Here the criminal's social and personal factors are less harsh, her femininity and youth, her unbalanced sex life and expulsion from the conjugal home and being the mother of a young boy—these individually inconclusive and cumulatively marginal facts and circumstances—tend towards award of life imprisonment.

In *Raghubir Singh v. State of Haryana*⁴⁴, the appellant had a sexual affair with a woman who feigned pregnancy to force him into marriage. The appellant being married and, therefore, reluctant to marry her caused her death by administering poison in a cup of milk. Despite the fact that the appellant was found to be lecherous even before his involvement with the deceased and the Supreme Court accepting that the murder was treacherous, the death sentence was reduced to life imprisonment, Krishna Iyer, J. giving the following reasons :

. . . But a few ameliorative features fall to be noticed since judicial temper has more components than indignation against murder. The convict is in his twenties, not irrelevant in considering death sentence. He is said to be a married man. He was promiscuous with women, a solacious sin for which the

44. (1975) 3 SCC 37 : 1974 SCC (Cri) 733.

deceased was a contributory. The latter's pressure to get him to marry her must have planted the seed of murderous thought in him. He bargained for romance, encouraged by the victim but the pregnancy—though pretended—in a society, which views unmarried mothers as vicious, upset the appellant. These have not bearing on guilt at all but attenuate the lethal touch of the sentence. Some planning and treachery have aggravated the crime, which also must not be overlooked. Yet another circumstance. The man was sentenced to death as early as May 23, 1972 and for twenty months the spectre of death penalty must have tormented his soul. Taken separately, none of these may suffice to commute but the conspectus of factors, personal and social, tilt the scale in favour of a life term.

The Supreme Court has continued to give judgments showing its preference to life imprisonment in all cases except those which do not have extenuating circumstances at all. A triple murder offender who killed his wife and two daughters supposedly under some kind of 'mental imbalance' as a result of dogbite got his death sentence commuted by the Supreme Court.⁴⁵ In yet another case, the Supreme Court reduced the capital punishment to life imprisonment on the ground of the quality of evidence against the appellant. It is interesting that the court found the approver's evidence corroborated by independent evidence to be sufficient for conviction for murder but not good enough to warrant death sentence.⁴⁶

Fine and Imprisonment

Fine and imprisonment are the two common modes of punishment. If fine or imprisonment is the only punishment provided for a particular offence, the only question for the court to determine is to fix the tariff within the permissible limits having regard to the circumstances of the case. If, however, the court has to make a choice out of the two punishments, it has to apply its mind in choosing the appropriate mode of punishment before fixing the tariff. Where imprisonment is the better alternative, it should not be as if a person can avoid imprisonment by paying a heavy fine because he can afford to do so. *R. v. Markwick*⁴⁷ is a good case illustrating the point. Markwick, a man of means, was convicted for stealing a sum of 2 sh. 6 d. from the pockets of the trousers

45. (1975) 1 SCC 318: 1975 SCC (Cri) 98.

46. *Subramaniam v. State of Tamil Nadu*, (1975) 3 SCC 414: 1975 SCC (Cri) 40.

47. (1953) 37 Cr App Rep 125.

of a fellow member in the changing room of the golf club. He was fined £500 against which he appealed to the Court of Criminal Appeal. Lord Goddard, C. J. held that fine was not the proper remedy in the case and an imprisonment of two months was substituted in place of fine. Lord Goddard justified imprisonment in the following words :

The gravamen of the offence was not only its essential meanness, but also the aura of suspicion which must have been thrown over the servants and other members of the club

Lord Goddard expressed the view that fines should not be used to give an opportunity to persons of means to avoid the punishment of imprisonment.

*Dulla v. State*⁴⁸, on the other hand, is a case which involves the opposite situation. In this case the Allahabad High Court found the imposition of a fine to be a better alternative than imprisonment having regard to the objects of punishment. The decision in the case lays down useful guidelines for choosing the appropriate punishments and the tariff to be imposed in the range permitted by the statute.

Six persons were found guilty for slaughtering a cow under the U. P. Prevention of Cow Slaughter Act and the magistrate sentenced them all to 18 months' rigorous imprisonment without giving any reasons for the quantum of punishment. The appeal against conviction and sentence was dismissed by the Sessions Judge and he too did not specify any grounds for the substantial period of imprisonment. On appeal to the High Court, James, J. quashed the conviction and observed that the punishment imposed would have been excessive even if the convictions were to be upheld and a fine of Rs. 50 would have been adequate. The court quoted Halsbury's LAWS OF ENGLAND to point out that the objects of punishment were incapacitation and reformation of the offender and intimidation of the actual and potential offenders. The Court summed up the principles of sentencing and fixation of tariff in the following words :

The twin objects of punishment are to prevent a person who has committed a crime from repeating it and to prevent

others from committing similar crimes. The sentence must be the least that will achieve both these objects. In deciding the measure of punishment the factors to be considered are the nature of the offence, circumstances in which offence was committed, the degree of deliberations, the provocation received if the crime is of violence, antecedents of the offender up to the time of crime, his age and character etc. The prevalence of a particular crime, in a particular area or during a particular period should also be taken into account. One's political, sentimental or religious pre-conceptions should be strictly disregarded. The Court must bear in mind the necessity of proportion between an offence and the penalty. The maximum penalty for any offence is meant only for the worst cases

The court considered the nature and circumstances of the alleged offence and concluded that nothing was done by the accused persons to hurt the religious feelings of the fellow citizens. No slaughtering was done in a public place nor was the flesh exposed to public view, the sole object being to procure cheap food. The court pointed out that the Cow Slaughter Act was based on economic considerations and nothing was known about the economic utility of the cow in the present case. Having regard to all these factors, the court held that a sentence of 18 months bore no relationship to the nature or gravity of the offence.

The decision shows that fine is the better alternative when the offence is not very grave or it is not really criminal in nature but is only of a technical character. The punishment of fine is particularly more appropriate when the offence is the result of cupidity of the offender or where the offender is of very young or old age.⁴⁹

The problem of fixing the quantum of fine or imprisonment in the range provided by the statute is not a simple one since a number of factors have got to be considered in fixing the sentence and no punishment can be truly regarded as the one exactly required or deserved in a given situation. In the case of *Ramashraya Chakravarty v. State of M. P.*⁵⁰, the Supreme Court quoted Hegel

49. These principles have been laid down in many cases. See AIR 1930 Lah 424; 6 IC 952 and AIR 1942 Mad 723.

50. (1976) 1 SCC 281; 1976 SCC (Cri) 1.

from his PHILOSOPHY OF RIGHT while focussing on the complexities involved in sentencing :

Reason cannot determine, nor can the concept provide any principle whose application could decide whether justice requires for any offence (i) a corporal punishment of forty lashes or thirty-nine, or (ii) a fine of five dollars or four, or (iii) imprisonment of a year or 364 days. And yet injustice is done at once if there is one lash too many, or one dollar or one cent, one week in prison or one day, too many or too few.

Regarding the factors to be considered in determining the quantum of punishment, the Court observed :

In judging the adequacy of a sentence the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would ordinarily be taken into consideration by the court.

With this general background regarding the selection of the appropriate punishment and the fixation of tariff some specific issues relating to fine and imprisonment can now be examined.

Fines

There is no difference regarding the matter of fixation of the quantum of fines or the length of imprisonments to the extent that greater tariff is provided for relatively graver offences. What, however, distinguishes fines from the length of imprisonment in the sentencing process is the additional dimension of the paying capacity of the offender which cannot be ignored. It is of course well established that the quantum of fine should not be such that it is wholly impossible for the offender to pay it without ruining himself and inflicting untold hardship on his family. This view has been reiterated by a number of High Courts in India on various occasions.

The English case, *R. v. Lewis*⁵¹ is apposite to the point. The accused was fined £10,000 by the trial Judge for a fraud committed on the customs. The accused was not in a position to pay such

a heavy penalty but the trial Judge based the tariff on the information that money would be made available by the accused's father. The Court of Criminal Appeal while reducing the fine to £5000 observed :

The first consideration in a matter of this sort is whether the accused person should go to prison or whether he can be properly dealt with by way of fine. Once the Court has decided that a fine is proper then there are obviously in each case many factors which may follow, but amongst the factors which the court must consider one can mention first the amount involved in the fraud, which in this instance was enormous, secondly the amount obtained out of it by the accused if known . . . thirdly his capacity to pay. It is in view of this court wrong in principle to impose such a fine as may be utterly beyond the accused's means and will only result in the prison sentence which is mentioned at the time of the trial as the sanction for failure to pay.

The court held therefore that it was wrong in such circumstances to impose a fine utterly beyond the means of the accused person.

The Model Penal Code of the American Law Institute has laid down the following criteria for the imposition of fines⁵² :

1. The Court shall not sentence a defendant only to pay a fine, when any other disposition is authorised by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

2. The Court shall not sentence a defendant to pay a fine in addition to a sentence of imprisonment or probation unless :

- (a) the defendant has derived a pecuniary gain from the crime ; or

- (b) the court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.

3. The Court shall not sentence a defendant to pay a fine unless :

(a) the defendant is or will be able to pay the fine ;
and

(b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

4. In determining the amount and method of payment of fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose.

While the poor paying capacity of the offender is certainly relevant and there cannot be much debate about it, the situation of an affluent offender cannot be described so easily. While on the one hand the fine should depend upon the gravity of the offence and hence it is independent of the monetary circumstances of the offender, the 'pinch factor' cannot also be ignored. The High Court of Allahabad observed in one of the old cases,⁵³ that the maximum fine prescribed for an offence is meant to be inflicted in extreme cases. Just because a man may easily pay a fine is no ground for ordering him to pay the maximum fine fixed by law, if the nature of the offence committed by him is not of the most serious character.

The opposite view that the fine should be adequate to cause a pinch to the offender has been advanced by the Advisory Council's Report on Non-custodial and Semi-custodial Penalties in England⁵⁴ :

In our view, it is right that penalties for similar offences should as far as possible be designed to make an equal impact on offenders, and that the well-to-do should pay more than the less affluent. The fine will be equitable only if it is assessed in this way and constitutes something more than payment for a licence to commit the particular offence.

There is much justification in the above recommendations since the purpose of punishment shall not be served unless the

53. AIR 1929 All 919.

54. Cited by Rupert Cross, *op. cit.*, p. 23.

offender pays enough to feel the loss. In the words of Rupert Cross, at least in the case of acquisitive offences, it is surely arguable that the wealth of the offender aggravates the crime just as his poverty mitigates it. A heavier fine would be justified on tariff principles because the offence is grave.⁵⁵

Apart from the gravity of the offence and the paying capacity of the offender, certain other factors are also to be considered. It has been held by the various High Courts that it is not desirable to impose the punishment of fine in addition to death sentence or long imprisonment, which may result in heavy burden upon the family of the convict.⁵⁶

The Supreme Court considered the problem of fixation of fines in the particular context of blackmarketing in the case of *Adamji Umar Dalal v. State*⁵⁷, and made the following observations :

The determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down . . . but the court has always to bear in mind the necessity of proportion between an offence and the penalty. In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence It is no doubt true that the offence of blackmarketing is very generally prevalent in this country at the present moment and when it is brought home against a person, no leniency in the matter of sentence should be shown and a certain amount of severity may be very appropriate and even called for. However when quite a substantial sentence of imprisonment is awarded to the accused, a person belonging to the commission agency class, imposition of unduly heavy fines which may have been justified to some extent in the case of the principals, is not called for.

The Court held that in imposing a fine of Rs. 1500 due regard had not been paid to these considerations. The Court observed that the zeal to crush the evil of blackmarketing and free the common man from the plague had perturbed the judicial mind

55. *Op. cit.*, p. 23.

56. 1953 Cri LJ 1568 (Ass) ; 1953 Cri LJ 733 (AP).

57. AIR 1952 SC 14 : 1953 Cri LJ 542.

in the determination of the measure of punishment and the fine was, therefore, reduced to Rs. 1000.

One fairly common problem faced in imposing the punishment of fines is the situation created due to the non-payment of fines by the offender. The failure to pay may be wilful or due to the incapacity of the offender or due to lack of means. The default leads to imprisonment which creates an anomalous situation, at least in those offences where fine is the only punishment prescribed under the statute. Though imprisonment is not really needed in the case of the particular offender as such, it is nevertheless the actual punishment given to him. Section 64, I. P. C. authorises the courts to send the offender to jail in such a situation but there is no doubt that such a practice is highly undesirable especially if the courts do it automatically in each and every case without having regard to the individual factors involved. The Hague Congress of 1951 deprecating this automatic conversion resolved :

Unpaid fines must be converted into imprisonment not automatically but by a court decision in each individual case.⁵⁸

Dr. K. S. Chhabra, who studied the problem of sentencing pattern with particular reference to Delhi in 1964, has the following observations to make⁵⁹ :

Study of the criminal court files of Delhi State showed an invariable practice of stating imprisonment in default of payment of fine in the same breath in which punishment of fine was imposed. It will be noted that Section 64 says that the court is competent to do so ; it does not make it obligatory that this must necessarily be done in the primary judgment itself. It is to avoid the botheration of fresh proceedings that this practice is being adopted as a matter of routine.

There is no reason to believe that what has been reported by Dr. Chhabra about Delhi is not true of the courts' attitude elsewhere in India.

Imprisonment

The problem faced in fixing the period of imprisonment is made more complex by the fact that both short term as well as

58. Quoted in Chhabra : *QUANTUM OF PUNISHMENT IN CRIMINAL LAW IN INDIA*, p. 213.

59. *Ibid.*

long term imprisonments have their inherent disadvantages. Short term imprisonments are regarded not only as being useless but also dangerous. They are useless in the sense that no institutional training or treatment is possible in short terms like one, there are six months and they are dangerous because the jails provide ideal surroundings to the novices and the minor offender for further training in a criminal career. In the words of Hentings⁶⁰ :

These short terms of imprisonment have no securitive function; the period is otherwise much too short to allow of an earnest educative effect or even if only a training for a profession. But this period is also quite sufficient to infect the condemned with the seeds of moral contagion and discharge them into liberty as previously convicted after the comparatively well equipped buildings and relatively good treatment have robbed them of their fear of prison.

Because of these defects in short term imprisonments it has been recommended by many expert individuals and bodies that as far as possible, no short term sentences should be passed.⁶¹ The better alternative is to proceed under the probation laws in such cases. It is estimated, however, that the majority of the sentences in India are for less than six months. Such sentences were 66% in 1911 and 87% in 1961 and 74% of the imprisonments below 6 months did not exceed the period of one month. The figures indicate that the trend in favour of short imprisonment has increased between the years 1911-61.⁶²

In *Lekhraj v. State*⁶³, a number of young persons were convicted of the offence of assembling to commit dacoity and shorter imprisonment was sought by the defence on the ground of the young age of some of the offenders. I. D. Dua, J. while opting for the award of long punishment observed :

I am not unmindful of the fact that a person, who spends some years in the company of hardened criminals in jail, may, by the time he comes out become much more callous than when he entered the State prison but I am also aware of the view, taken in some decided cases, that a short stay in jail

60. Quoted, Chhabra, *op. cit.*, p. 158.

61. Dr. Walter C. Reckless, Jails Committee, 1919-20 and Hague Convention, 1951 have made recommendations against short term sentences.

62. See Chhabra, *op. cit.*, p. 150.

63. AIR 1960 Punj 482.

sometimes proves more harmful to the accused. It brands a person as a previous convict without affording him the advantages of leading a disciplined life in jail for a sufficiently long time.

The stigma of a convict without the healthy effect of a disciplined influence, which a reasonably long period, in a properly administered jail in a welfare State, can have, is likely to result in more harm than good, but the remedy for this situation lies in reformation of the administration of the State jails and not to abstain from punishing people for such grave offences as have been established in the instant case. It appears to me to be for the legislative and the executive wings of the Government, rather for the judiciary, to come to the rescue of the citizens in this connection.

It is interesting to note that the arguments against short term punishments, usually given when imprisonment is not to be awarded, have been employed here to give a long term of imprisonment.

Longer punishments have also been subjected to the criticism that they are unnecessary since they are based on the unestablished assumption that all long term prisoners are more dangerous than short termers. In the U. S. A., prison wardens generally agree that only a small minority of their inmates can be considered dangerous. *Gideon's case*⁶⁴ is cited as an example that the offenders who are released before their scheduled term do not show more recidivism than those who are released after serving the full term. As a result of the decision 1000 prisoners in Florida were released and a comparative study of a sample group of these released prisoners with a sample of controlled group prisoners showed that while the recidivism was only 13.6 per cent in the former group it was 25.4 per cent in the latter.

The sentencing policy of the courts in India in fixing the imprisonment tariff can be further assessed in the context of some specific situations.

Public servants

Generally speaking the courts in India have taken a serious view of the offences committed by public servants. A typical

64. 372 US 335 (1963) (in this case the prisoner was released since his constitutional right to lawyer was violated).

attitude is manifested in a Rajasthan case where the court outlined the dangers involved in corruption by public servants in the following observations⁶⁵ :

A corrupt official is a menace to the society and far from helping in the proper functioning of the Government and implementing the laws, brings the Government and society at large into disrepute. . . . If such public servants are open to corruption and coerce the public into paying them illegal gratification the whole structure of the society would be upset and the policy of the Government and the legislature, however beneficial it may be, would generally suffer. A public servant, therefore, once he is found to be guilty of accepting or obtaining illegal gratification, deserves no soft corner or indulgence from the courts of law.

The courts have, however, reduced the punishments in the presence of extenuating factors like other sufferings accompanying the conviction or where the offence happened to be not illegal gratification but criminal breach of trust committed due to the pressure or influence of the superior officers. The loss of membership of the Municipal Board has been, for instance, accepted as a factor warranting reduction in punishment.⁶⁶ In many cases the loss of the job consequent to the conviction has been found relevant in reducing the term of imprisonment. In *Chakravarty v. State of M. P.*⁶⁷, a case decided by the Supreme Court, the offender was a government servant, employed as a Circle Organiser in the Tribal Welfare Department of Madhya Pradesh. He misappropriated Rs. 500 entrusted to him for distribution to Adhivasi students and forged certain entries. The Sessions Court found him guilty of the offences under Sections 409 and 467 I. P. C. and awarded 4 years' rigorous imprisonment and fine of Rs. 500. The High Court reduced it to 2 years' imprisonment and a fine of Rs. 500. On appeal the Supreme Court further reduced the period of imprisonment to one year giving the following reasons :

The appellant is a young man of 30 years. He is an educated person who was employed in government service. But for the forgery he could have been tried in the court of a first class magistrate for the offences under Section 409

65. 1958 Raj LW 596.

66. AIR 1953 All 381.

67. (1976) 1 SCC 281 : 1976 SCC (Cri) 1.

I. P. C. and in that case the maximum sentence of imprisonment would have been two years. On the face of the High Court's judgment the part played by the appellant in the forgery is rather obscure. The appellant is sure to lose his employment under the Government. There is already indignity heaped upon him on account of conviction. He has no opportunity to commit such offences under the Government in future. Any sentence of imprisonment imposed upon him will be a deterrent to others similarly disposed in such unlawful pursuit.

There is ample truth in what was said by the Supreme Court for justifying the reduction in punishment but the observations shall be apposite in any case relating to a public servant including those found guilty of accepting illegal gratification. Another question which comes to one's mind is regarding the one year's imprisonment awarded by the Supreme Court. If the reasons given by the Court are accepted, then there is hardly any justification for giving even one year's imprisonment in such cases. The policy of the Court as manifested in the above case is somewhat different from the stand taken by the appellate court in England in *Fell's case*⁶⁸ where a senior civil servant pleaded guilty to unlawfully communicating documents. The court refused to reduce a sentence of two years saying that the additional suffering caused to the appellant by reason of the loss of her career did not "excuse the court from imposing a sentence which will mark the seriousness of the offence committed by a person in high position of trust".

In another case the Supreme Court gave due recognition to the role played by the superior officers of the appellant in reducing the punishment from 2 years to the 10 months' imprisonment already undergone.⁶⁹ The appellant, a cashier in the Municipal Board, was required to deposit a sum exceeding Rs. 4000 in the treasury which he failed to do since he had advanced various sums of money to the officers of the board. In reducing the punishment the Supreme Court found force in the contention of the accused that he was more sinned against than sinning and that the misappropriation took place because he had to oblige those officers of the board or otherwise incur their displeasure which he could hardly afford to do.

68. 1963 Cri LR 207.

69. *Munnalal v. State of U. P.*, AIR 1964 SC 28 : (1964) 1 Cri LJ 11.

Food Adulteration

The sentencing policy of the courts in making the primary decision in the context of food adulteration offences has been discussed earlier. So far as the secondary decisions are concerned, it appears that the courts have taken a tough line,⁷⁰ at least at the appellate level but as seen in the offences committed by public servants, various mitigating factors have also been taken into account. It has been noted with concern that many a time the punishments given by the lower courts are exceedingly low. The Gujarat High Court has made strong observations against socio-economic offenders and passed severe strictures against the lenient attitude of the lower judiciary in food adulteration cases as follows⁷¹:

It is part of the function of courts to create an ethical climate by their decisions. The decisions mould public opinion and create an appropriate ecology. . . . If we are seriously and sincerely striving for a just socio-economic order, and an egalitarian society, can we look upon such modes of adding to one's wealth. . . with indulgence? . . . The offenders must be made to realise that the moving finger writes and having written moves on. And that the message is: Thy days are numbered. While the purpose of the sentencing policy is not to terrorise unwary persons, it certainly is to strike terror in the evil-eyed avaricious offenders to ensure that it has its desired deterrent effect. Unless it is brought home to the offenders that the courts take an extremely serious view, all those who play with the health and well-being of the people and with the economy of the nation by indulging in hoarding, profiteering, blackmarketing and tax-evasion will be tempted to commit and re-commit these offences. . . The sentence of fine can have no meaning when it bears no relation with the profit that the offender can earn by taking a small risk of a fine by entering a plea of guilt. The frequency with which a plea of guilt is made in such cases and is visited with the deceptive sentence of tom-sized mini-fines makes one seriously doubt whether such cases should be tried by the subordinate judiciary at all. . . .

The scope of mitigating circumstances can be illustrated with a couple of cases. In *Bala Bahera v. Puri Municipality*⁷², the accused, a hawker of milk, was found guilty of selling adulterated stuff.

70. See AIR 1965 All 39 : (1964) 1 Cri LJ 606.

71. (1974) 15 GLR 736.

72. (1973) 1 CWR 744.

The court held that in view of the fact that it was his first offence, substantive imprisonment need not be imposed.

In *Gurmukh Singh v. State of Punjab*⁷³ the Supreme Court distinguished between selling adulterated food as such from some other violations of the Prevention of Food Adulteration Act and held the latter to be of lesser gravity than the former. The appellant was convicted for the non-renewal of licence and awarded imprisonment for six months and a fine of Rs. 1000 which the Supreme Court reduced to the imprisonment of seven days already undergone and a fine of Rs. 250.

While fixing the length of imprisonment or quantum of fine, the courts have taken into account the extent of adulteration and the nature and properties of the substance used for adulteration. In *Ajaib Singh v. State of Punjab*⁷⁴, the offender was found guilty of adulterating milk with sucrose which is the main ingredient of sugar. Having regard to the facts that sugar was not only non-injurious to human body but also quite nutritious, the price of sugar was higher than that of milk, and the public analyst's report did not specify the percentage of sucrose in the milk which might have been quite low, the High Court held that a very lenient sentence was called for.

Habitual offenders

Recidivism as a phenomenon raises questions which penology finds difficult to answer. What is to be done to the habitual offenders who repeatedly commit crimes and the punishments given to them do not make any deterrent or reformatory impact on them? According to Dr. D. J. West, habitual offenders may be either mentally normal human beings or mental deviants. There are two kinds of mental deviants *i. e.* those who are active aggressive deviants possessing psychopathic characteristics and the other type who are called passive inadequate deviants.⁷⁵ While in the case of mentally normal offenders, it may possibly be argued that some appropriate punishment may deliver the goods, it certainly cannot be said about habitual offenders who cling to a criminal career

73. AIR 1972 SC 824 : 1972 Cri LJ 634.

74. (1974) 76 PLR 45.

75. HABITUAL OFFENDERS, Institute of Criminology, University of Cambridge, 1962.

due to their mental deviation. Surely prisons are not the answer to the problems posed by them. The solution lies in the therapeutic diagnosis and treatment accordingly which in the Indian context is almost impossible at present.

In India the problem of recidivism has been sought to be tackled in two ways *i.e.* by providing for longer punishments in certain situations and by keeping track of the movements of the offender after his release from the prison.

The provision for longer sentences is to be found in Section 75 of the Penal Code. The section lays down that persons once found guilty of any offence under Chapter XII or XVII of the Code⁷⁶ and sentenced to a term of three years or more imprisonment, may be awarded life imprisonment or upto a 10 years' term if again found guilty of any offence under any one of the two chapters.

Longer sentences have their own shortcomings as discussed earlier. Not only are they quite unnecessary and even futile sometimes, they are highly demoralising to the offender. A human being with no hope in the future is not likely to derive any benefit from his incarceration. The other inmates may, on the other hand, get adversely affected by coming into contact with the hardened and insensitive souls. The courts, however, have been extremely lukewarm in applying Section 75 of the Code. It has been emphasised by some of the High Courts that though Section 75 enables the courts to give enhanced punishment in certain cases, the provision is not of mandatory nature and hence should be applied discriminately.^{76a} *Kasim Ali v. Emperor*⁷⁷ illustrates as to how the courts drag their feet so far as enhanced punishments under Section 75 are considered. It was held in that case that Section 75 should not be applied mechanically and where the appellant yielded to sudden temptation of pocket-picking, a heavy sentence was not justified.

The Law Commission of India has recognised the utility of Section 75 of the Penal Code for protecting the public against

76. These two chapters deal with offences relating to stamps and coins and property like theft, extortion, robbery and dacoity.

76a. See 1957 Cri LJ 275.

77. 7 Cri LJ 293.

persistent offenders.⁷⁸ The Commission was of the view that there was no reason to confine the application of the provision to offences relating to coin and stamps and offences against property and, therefore, recommended the extension of Section 75 to all the offences under the Code punishable with imprisonment upto three years or more. They also recommended that Section 75 ought not to be applied where there was no imprisonment on the last conviction but some other course like fine or probation was adopted. Further it was recommended that the provision for enhanced punishment be applied only if the subsequent offence was committed within three years of the offender's release from the prison for the last offence committed by him.

The Commission is fully justified in recommending the extension of the provision to the other offences but there appears to be no adequate reason for not applying the provision if the subsequent offence takes place after a certain period of time. It would be better if the judicial discretion is not controlled by any such stipulation so as to enable them to adjust the sentence according to the peculiar circumstances of a case.

The Penal Code Bill of 1972 has however incorporated almost all the recommendations of the Commission with minor variations:⁷⁹

Whoever, having been convicted by a court in India of an offence punishable under this Code with imprisonment of either description for a term of two years or upwards, commits within five years from the date of his final release from prison after serving that sentence, any offence punishable under this Code with imprisonment for the like term, shall be subject for every such subsequent offence to imprisonment for life, or to imprisonment of either description for a term which may extend to ten years.

The other strategy adopted in India is to impose certain obligations on the convict in order to enable the Government to keep itself informed about his movements. This has been provided under the various Habitual Offenders Acts passed by the various States and also under Section 356 of the Criminal Procedure Act of 1973 which, *inter alia*, provides as follows:

When any person, having been convicted by a Court in India of an offence punishable under Section 215, Section

78. Forty-second Report, pp. 78-80.

79. Clause 30.

489-A, Section 489-B, Section 489-C or Section 489-D of the Indian Penal Code, or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment for a term of three years or upwards is again convicted of any offence punishable under any of those sections or chapters with imprisonment for a term of three years or upwards by any court other than that of a Magistrate of the second class, such court may, if it thinks fit, at the time of passing a sentence of imprisonment on such person, also order that his residence and any change of, or absence from, such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of expiration of such sentence.

The State Governments have been empowered to make rules to carry out the provisions of the sub-section reproduced above. In many States, Habitual Offenders Acts have been passed which have probably been enacted because orders are seldom passed under Section 356 Cr. P. C. (Section 565 of the old Code).⁸⁰ No doubt such a provision is not in consonance with the individual freedom and dignity but it should be accepted as a necessary evil based on rational considerations. There appears to be no better alternative to the conditions obtaining at present.⁸¹ The idea of penal colonies where habitual offenders may be made to live with their families and allowed to work has been mooted by some criminologists. Compared to prisons, the penal colonies may be better in certain aspects but stigmatisation and contamination of the families of the offenders is a serious potential risk. A system based on the frequent and efficient application of Section 356 Cr. P. C. and analogous provisions of the Habitual Offenders Acts can produce good results to some extent if it is integrated with adequate probation and after-care programmes.

Disparity in Sentencing

One difficult problem relating to the sentencing process is the lack of uniformity in the quantum of punishments given by different courts for the same or similar offences.^{81a} Obviously it would be unreasonable to expect uniformity of a very high degree since

80. Chhabra, op. cit., p. 196.

81. Only a few States like U. P. and Maharashtra have enacted provisions for reformatories where recidivists can be detained for three years after release.

81a. In *Rameshwar Dayal v. State of U.P.*, (1971) 3 SCC 924: 1972 SCC (Cri) 172 the Supreme Court noticed two different cases where on identical facts the punishment in one case was four years' imprisonment and in the other three months.

penology is not the kind of discipline capable of giving readymade formulae of precise nature to meet the various situations nor do all the judges and magistrates possess the same attitudes while sentencing since they are bound to be influenced by their own values and personalities. In this connection the following observations of Sheldon Glueck are also pertinent :

... it is a naive self-confidence that makes a judge, or criminologist, or psychiatrist, or probation officer assume that he can detect the minutest details of difference of personality, character, motivation, socio-economic background and other subtle factors and forces that distinguish one offender from another, and on top of that determine the exact nature and amount of correctional rehabilitative treatment suited to the individual case and to that case alone. Only God can do that; and since judges are not gods, we get the following practical results in the "individualisation" of sentences.⁸²

Though some disparity in sentencing is inevitable in view of the factors described above, it is difficult to accept a very high degree of disparity found in sentencing by different courts since it involves not only questions of justice as such but also the offenders' perception of justice on the basis of punishment received by them. Even in the U. S. A. where the application of scientific penology is much more in vogue than in many other countries, the sentencing disparity is quite formidable as reported by the President's Commission on Law Enforcement and the Administration of Justice⁸³ :

In the Federal system, for example, the average length of prison sentences for narcotic violations in 1965 was 83 months in the 10th Circuit, but only 44 months in the 3rd Circuit. During 1962 the average sentence for forgery ranged from a high of 68 months in the Northern District of Mississippi to a low of 7 months in the Southern District of Mississippi; the highest average sentence for auto theft was 47 months in the Southern District of Iowa, and the lowest was 14 months in the Northern District of New York.

Disparity among judges sitting in the same court is illustrated by the findings of a recent study of the Detroit Recorder's Court. Over a 20-month period in which the sample

82. 41 *Journal of Criminal Law and Criminology*, 717. Glueck refers here to an analysis of 7000 sentences to show substantial disparity in the U. S. A.

83. *THE COURTS*, 1967, pp. 23-24.

cases were about equally distributed among the 10 judges, 1 judge imposed prison terms on 75 to 90 per cent of the defendants whom he sentenced, while another judge imposed prison sentences twice as long as those of most lenient judge. The study also showed that judges who imposed the most severe sentences for certain crimes also exhibited the most liberal sentencing policy for other offences.

The Commission pointed out the effects of sentencing disparity on the administration of criminal justice and the attitudes of the offenders :

Unwarranted sentencing disparity is contrary to the principle of evenhanded administration of the criminal law. As Attorney General Robert H. Jackson stated: 'It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should be dependent in large part on a purely fortuitous circumstance, namely, the personality of the particular judge before whom the case happens to come for disposition.' Unjustified disparity adversely affects correctional administration. Prisoners compare their sentences, and a prisoner who is given cause to believe that he is the victim of a judge's prejudices often is a hostile inmate, resistant to correctional treatment as well as discipline.

Disparity Reduction

Though the sentencing disparity cannot be eliminated altogether, yet efforts can be made for reducing it to the minimum level. The strategies indicated are the better training of the judicial personnel and the coordination of sentencing policies through sentencing councils. It has also been suggested that the job of sentencing should be taken away either wholly or partly from the judicial personnel and the same should be entrusted to the boards consisting of experts trained in disciplines like social work, psychiatry and allied disciplines. Provision for appellate review of sentences is also made in the criminal laws which go a long way in reducing the disparities.

Improving sentencing skills should be an important part of any scheme which aims to make sentencing practices more consistent. The trial judge should be made well conversant with all the alternative sentences and their application in the appropriate situations. He should be trained to evaluate pre-sentence and psychiatric reports in cases where they are made available to him.

In the U. S. A. there is a National College of State Trial Judges where short but intensive training is imparted to the newly appointed judges. Besides institutes wholly devoted to sentencing are frequently held for the benefit of judges in the Federal system and also in few States like California, New York and Pennsylvania.

An effective technique employed in the U. S. A. to achieve coordination between the different judges of a multijudge court is the system of sentencing council. The judges meet in the sentencing councils to discuss the punishments to be awarded in the cases pending before them. This procedure is conducive to uniformity in sentencing pattern; the only snag is that the council meets before the judge gets an opportunity of hearing the defence on sentencing and therefore the judge may not be able to pass the sentence with an open mind because of the inhibitions created by the earlier discussions with his colleagues.

It has also been mooted that since sentencing requires more experience in the fields of social work and psychiatry than in law, the job must be entrusted to a board of experts since a busy judge may not have the necessary training and equipment for it. The idea, attractive as such, has however been criticised because of the potentialities of abuse in view of the non-judicial character of the board. To some extent such apprehensions can be eliminated by providing for appeals to the superior courts which may interfere with the sentence in suitable cases.

Another alternative is to try a combination of the judiciary and board of experts by employing the technique of indeterminate sentence. The sentencing judge may award a sentence indicating maximum and minimum limits and the board then decides the actual time of release on the basis of the performance and promise of the convict in the institution. Sentence is absolutely indeterminate when no limits are laid down by the judge. Undoubtedly indeterminate sentences are the best means to achieve the rehabilitative and reformatory ideal. The Congress of Comparative Law held at Hague in 1937 resolved that the time of detention should be capable of being shortened or prolonged as a result of the consideration of a report on the progress of the recidivist made by some competent authority.

Appellate Review of Sentences

In all western countries except the U. S. A. grossly excessive sentences are subject to routine review and correction of appellate tribunals.⁸⁴ In the U. S. A., in the majority of the jurisdictions, the appeals against sentencing are not possible since the trial judge is considered to be the best person to deal with the sentencing part. This assumption is based on the belief that sentencing involves questions of judgment and not of law and that appellate judges are less able to assess an appropriate sentence because of their inability to observe the defendant.⁸⁵

In India, appeals against sentences are possible to the superior courts, High Courts and ultimately to the Supreme Court under the powers given to them in the Criminal Procedure Code and the Constitution. The merit of appellate jurisdiction in matters relating to sentencing lies in the fact that apart from correcting the occasional waywardness of the trial courts in awarding punishment, the principles laid down by the appellate courts are conducive to greater uniformity in sentencing in the lower courts.

This leads to the important issue of reasoned sentencing decisions without which the convicted person is likely to be handicapped while preferring an appeal against his sentence. Reasoned decisions on sentencing are a must in view of the principles of natural justice, otherwise the decisions tend to be arbitrary or they are at least perceived to be so by the offenders. Reasoned decisions go a long way in the rationalisation of punishments leading to greater consistency in sentencing policy. It is not infrequent that the trial courts in India fail to give reasons for the sentencing decisions or do not spell out the reasons adequately.

Nigel Walker's proposals

Dr. Nigel Walker is of the view that in actual sentencing the courts tend to award punishments around a certain range more frequently than the rest of the range which is authorised by law for a certain offence. By citing the sentencing statistics for the

84. President's Commission, op. cit., p. 329.

85. *Ibid.*

offence of housebreaking in England and Wales in the years 1964-66, he shows that there are 'about six fashionable lengths of six, nine, twelve, eighteen, twenty-four and thirty-six months, which in practice usually meant incarceration for two thirds of these periods', the maximum possible imprisonment being 7 years for the offence. The 'fashionable range' accounted for 85 per cent of the offences. The range beyond five years being in negligible number of cases, 15% offences were covered by what Walker calls 'odd intermediate lengths'. Walker questions the utility of these 'odd intermediate lengths' from three angles, deterrence, correction and security of the public and concludes that none of the three functions were being fulfilled by these lengths. His general conclusion is that punishments of less than six months should not be given and that a large variety of periods of imprisonment for the same offence or even for different offences did not make much sense from a practical angle. Walker maintains that the sentencing ranges of imprisonment could be streamlined with only a limited choice available to the judges. He, therefore suggests a system under which a person found guilty of any offence for the first time would be sentenced to a maximum of two years' imprisonment. He shall have to be in the prison for at least six months. The time of his release, between six months and two years, shall be determined by the prison authorities on the basis of his behaviour and promise shown for the future. In case of any subsequent conviction, the offender would be sentenced to five years maximum imprisonment and the minimum period of detention is to be six months more than what he spent last time in the jail.⁸⁶

Dr. Walker has raised many pertinent questions about the traditional sentencing process and has made suggestions which are truly radical. There is no doubt that his proposed scheme does away with many factors resulting in disparity in sentencing so far as courts are concerned. Whether the discretion to be vested in the prison authorities would produce better results in terms of scientific penology is anybody's guess. The obvious objection to Dr. Walker's proposals is that since the minimum and maximum punishments are the same for all the offences where imprisonment is the remedy, the differences between the offences based on gravity

86. *Op. cit.*, pp. 123-130.

and moral considerations shall cease to have any relevance, a situation which may not be acceptable to many of us. Rupert Cross quoted Beccaria while criticising Dr. Walker on this aspect:

Whoever sees the same penalty of death is laid down, for example, for the man who kills a pheasant, the man who murders another man, or the man who falsifies an important document, will draw no distinction between these crimes. This destroys those moral sentiments, which are the work of many centuries and the result of much spilling of blood, which have been produced solely and painfully in the human mind; their birth, we may believe, having depended on the help of the sublimest motives and the gravest of formal observance.⁸⁷

It should, however, be pointed out in fairness to Nigel Walker's proposals that he excluded 'dangerous offenders' from his scheme and he also emphasised that his proposals were not meant to cover the offences for which some punishment other than imprisonment was prescribed.

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Chapter XI

WHITE-COLLAR CRIME

The anti-social activities of persons of the upper strata in their occupations, which have come to be known as 'white-collar' crimes, have been given their due importance in the recent past only after the pioneering work done by Prof. Edwin H. Sutherland in this area of great contemporary concern. It should not, however, be concluded that there was no such problem or its awareness before Sutherland focussed his attention on this variety of crime about thirty-five years ago. As observed by Barnes and Tetters :

There has always been crime among businessmen. There have always been instances of violation of trust. Most of us have read of chicanery and plunder in the history books and such acts have often constituted the central theme of the fiction of earlier times. But the American people seemed to believe that anyone who betrayed a trust or who mulcted the widow's mite in a shady but legal deal, would eventually suffer—if not here, surely in the hereafter. Existing practices, however, were generally accepted as being within the canons of good business. Business, therefore, was justified in pulling a shrewd deal. The victim either did not report what was done for fear of being ridiculed, or received little sympathy because he had been fleeced in a social, approved and even legal deal. *Caveat emptor*—let the buyer beware—expressed the prevalent attitude.¹

Prof. Sutherland was preceded by others who were aware of the damage to society from the upper socio-economic groups who exploited the accepted economic system to the detriment of the masses. Prof. Albert Morris calls attention to a paper entitled *Criminal Capitalists* read by Edwin C. Hill before the International Congress on the Prevention and Repression of Crime at London in 1872. In this paper the writer noted the "growing significance of

1. NEW HORIZONS IN CRIMINOLOGY, 3rd Edition, pp. 43-44.

crime as an organised business requiring the co-operation of real estate owners, investors and manufacturers and other 'honest' people''. As early as 1934 Professor Morris called sharp attention to the necessity of a change in emphasis regarding crime.² Muck-reckers condemned such practices (subsequently called white-collar crimes) decades ago. Nearly all textbooks on labour problems, corporation problems, problems of finance, and so on condemn them.³

Professor Sutherland's contribution is unmatched in the sense that he was the first criminologist who sought to extend the frontiers of criminology by including the study of white-collar crimes in it. Prior to his focussing attention on white-collar criminality, criminologists confined themselves to the study and research of blue-collar crimes *i.e.* traditional crimes like theft, burglary, robbery and acts involving violence committed by the persons of lower socio-economic status. In the words of Donald R. Crassey, the lasting merit of Sutherland's book *WHITE COLLAR CRIME* is its demonstration that a pattern of crime can be found to exist outside the focus of both popular preoccupation with crime and scientific investigation of crime and criminality.⁴ Subsequently quite a few other criminologists took up various research studies of white collar crimes.⁵

Nature and Definition of 'White-Collar Crime'

Prof. Sutherland presented his concept of 'white-collar' crime in his address to the American Sociological Society in 1939. Sutherland defined white-collar crime as "crime committed by a person of respectability and high social status in the course of his occupation". Later, he seems to have added a refinement to the definition, by defining a white-collar criminal as "a person of the upper socio-economic class who violates the criminal law in the course of his occupational or professional activities".⁶ He pointed out that white-collar crime was more dangerous to society than ordinary crimes firstly, because the financial losses were higher, and

2. *NEW HORIZONS IN CRIMINOLOGY*, p. 41.

3. Taft and England: *CRIMINOLOGY*, p. 202.

4. Donald R. Crassey, Foreword in Sutherland: *WHITE COLLAR CRIME* (New York: Holt, Rinehart Winston, 1961), p. xii.

5. Clinard, Hartung, Lane, Aubert, Crassey, Newman and Quinney.

6. Law Commission's Report, No. 29, p. 6.

secondly, because of the damage inflicted on public morals. Comparing the financial losses resulting due to white-collar crimes with ordinary crimes, he observes :

The financial loss to society from white-collar crimes is probably greater than the financial loss from burglaries, robberies, and larcenies committed by persons of the lower socio-economic class. The average loss per burglary is less than one hundred dollars, a burglary which yields as much as fifty thousand dollars is exceedingly rare, and a million-dollar burglary is practically unknown. On the other hand, there may be several million-dollar embezzlements reported in one year. Embezzlements, however, are peccadilloes compared with the large scale crimes committed by corporations, investment trusts, and public utility holding companies, reports of fifty-million-dollar losses from such criminal behaviour are by no means uncommon.⁷

Regarding the social damage to morale and institutions, Sutherland expresses the view that the financial loss is more important than the damage to social relations, since it creates distrust, lowers morale and produces disorganisation on a large scale. On the other hand, the social damage from ordinary crime is said to have relatively little effect on our institutions and social organization.⁸ How the legal institutions and laws are brought into contempt and disrepute is illustrated by Marshal B. Clinard. He points out that the wartime black-market crimes set an example of disobedience of law by presumably reputable businessmen far more flagrant than in the case of most robberies, burglaries and larcenies.⁹

Types of White-Collar Crimes

The main crimes that have attracted attention in the U. S. A. under the head of white-collar crimes, may be summarised as follows :

- (a) frauds in business, in relation to sale of bonds and investments ;

7. Sutherland : *Crime and Business*, The Annals of the American Academy of Political and Social Science, Vol. 217 (1941), p. 112.

8. *Ibid.*

9. Sutherland : WHITE-COLLAR CRIMINALITY, American Sociological Review, Vol. 5, No. 1, (1940), pp. 2-3.

- (b) adulteration of foods and drugs, and misleading advertisements ;
- (c) malpractices in the medical profession, such as illegal sale of alcohol and narcotics, abortion, illegal services to underworld criminals, fraudulent reports and testimony in accident cases, extreme cases of unnecessary treatment, fake specialists, restriction of competition and fee splitting ;
- (d) crimes by lawyers, such as guiding the criminal or quasi-criminal activities of corporations, twisting of testimony to give a false picture, fake claims (bogus liability in accidents), etc.
- (e) trusts, cartels, combines and syndicates etc. formed to combat competition, or to raise prices or otherwise to interfere with the freedom of trade to the detriment of honest businessmen or the consuming public. This has now become a branch of law by itself and is usually dealt with under the topic of "Anti-trust legislation" ;
- (f) bribery and graft by public officers.¹⁰

Since Sutherland limits the concept to unlawful behaviour engaged in for the purpose of furthering the financial or strategic interests of legitimate callings, crimes by respectable people committed for other purposes are not white-collar crimes : murder of his spouse by a businessman or bribery of a traffic officer by a motorist who happens to be a physician are not encompassed by the concept.¹¹

Criticism of Sutherland's Definition

The concept of white-collar crime as propounded by Sutherland has evoked sharp criticism particularly from those who maintain that only a person found guilty of violating a criminal law provision by a criminal court, can legitimately be regarded as a criminal. Most of the white-collar crimes, though violations of penal law, are not handled by ordinary criminal courts but by commissions, administrative tribunals and boards. It is argued,

10. Law Commission's Report, No. 29, 1966, pp. 10-11.

11. Taft and England, *op. cit.*, p. 200.

therefore, that the administrative handling of white-collar offences cannot result in the conviction of the offender in the legalistic sense and the white-collar offender, therefore, cannot be said to have acquired the status of a criminal.

Paul W. Tappan, an ardent advocate of the legal definition of crime, fears that the inclusion of administrative decisions as the basis for defining non-conformists as criminals opens the door to the extension of the concept of crime to cover behaviours which a particular administrator deems nefarious. The moral values of the administrator would be substituted for what Tappan regards as the "clarity and precision" of the legalistic definition of crime.¹²

This criticism is based on the premise that criminal proceedings involve a prescribed procedure which guarantees various safeguards to the offender. Such safeguards are lacking when an offender faces proceedings before an administrative agency. The same administrative agency or commission directs investigations, conducts hearings and awards punishments; an altogether different situation from the one obtaining in criminal courts. Among other factors, one very vital difference between criminal courts and the administrative agencies is in the quantum of burden of proof against the accused person. In criminal courts, the prosecution has to prove its case beyond any reasonable doubt which, at times, is quite an onerous job. Administrative bodies are not inhibited by these problems to such an extent.

Sutherland concedes that an act is not a crime unless it is punishable by the State and to that extent he is quite consistent as compared to many other writers on white-collar crimes. Moreover, he stated that the concept was not intended to be definitive but merely to call attention to crimes which are not ordinarily included within the scope of criminology.¹³ He is, however, of the view that the punishment need not necessarily be given through a criminal court. According to him, white-collar offences are crimes because they have been legally proscribed as socially harmful and because legal sanctions in the form of various punishments are available to deal with them. He also maintains that an unlawful

12. Paul W. Tappan: *Who is Criminal?* American Sociological Review, 12, pp. 96-102.

13. WHITE COLLAR CRIME, op. cit., p. 9.

act being *punishable* is more important than whether it is punished. Regarding the lack of safeguards in the proceedings before the administrative bodies, Sutherland points out that sometimes a defendant may not have real safeguards even in criminal courts if he cannot afford a lawyer on account of his poverty. This argument of Sutherland, it is submitted, does not carry much weight. Lawyers are generally made available to the indigent persons in criminal proceedings, particularly in more serious offences. Even where no lawyer is provided to the accused person, the criminal courts are extra-careful to see that the accused is not prejudiced in any way due to the lack of a lawyer to defend him.

Further, Sutherland observes that the actual difference in presumption of innocence is not great when procedures of criminal courts and administrative agencies are compared. According to him, the differences in procedures were designed to protect the offender from the stigma of criminal prosecution.¹⁴

The inclusion of white-collar offences has also been objected to on the basis of the sociological argument that the perpetrators of such offences do not regard themselves as criminals. This argument led to a controversy between Hartung and Burgess in the early fifties. Hartung contended that white-collar crime (and black marketing) should be considered, sociologically, as crime just as any other kind of crime.¹⁵ Burgess, on the other hand, maintains that the definition of criminals should be limited to persons who conceive of themselves as criminals and are so conceived by society.¹⁶ He illustrated it by pointing out that OPA* violators did not conceive of themselves as criminals and neither did the public; that the Emergency Price Control Act of 1942 and the Second War Powers Act suddenly transformed former business practices into crimes; that the public, the government and the press made no concerted effort to condemn OPA violators and stigmatize them as burglars, robbers, forgers and so forth; that large segments of the public participated in the blackmarket practices (just as they did in bootlegging in times of prohibition); that only a small fraction

14. WHITE-COLLAR CRIME (1961).

15. Parank E. Hartung, *White Collar Offences in the Wholesale Meat Industry in Detroit*, American Journal of Sociology, Vol. 56 (1950-1951), pp. 26, 29-30.

16. Earnest W. Burgess, American Journal of Sociology, Vol. 56, pp. 32-34.

* Office of Price Administration.

of OPA violators received prison sentences, which were light compared to sentences for ordinary property crimes.¹⁷ This is countered by Mannheim by making the observation that the criminal law cannot be made completely dependent on the offender's own view of whether or not he has violated the law and should be punished.¹⁸ Moreover, it is highly doubtful that the white-collar offenders do not regard themselves as violators of law. According to Clinard's finding, white-collar offenders generally regard themselves as law violators and the evasive nature of most violations indicates awareness of illegality and repudiates the contention that the violations were unwittingly committed.¹⁹ Even Geis, who is critical of Sutherland's definition, rejects the contention that the legal offences of corporate executives are not crimes because they do not perceive of their activities as criminal. Geis supports Hartung in contending that the corporate executives, involved in violation of legal norms, do regard themselves as violators, both "before and after conviction".²⁰ This he supported by citing the testimony of high executives involved in the proceedings in the General Electric cases. Finally if the test to be applied for criminality is the self-image of the offender, most of the criminals, particularly situational offenders would have to be excluded from the criminal population and only professional criminals would be the relevant subjects for criminological studies.

Sutherland used the term 'white-collar' crime in the sense of legal violation but subsequently the expression has been extended beyond the legal frontiers. Unethical but lawful acts like tax-avoidance as distinct from tax-evasion, and undercutting the prices of goods are the instances on the point. This has evoked criticism from those who insist that the definition of crime must be kept within the limits prescribed by law. Paul Tappan make the following observations to criticise the extended meaning given to the concept of crime in white-collar offences :

When Professor Sutherland launched the term, it was applied to those individuals of upper socio-economic class who

17. Walter C. Reckless : *THE CRIME PROBLEM* (1967), p. 357.

18. Hermann Mannheim : *COMPARATIVE CRIMINOLOGY*, (1965), Vol. II, p. 479.

19. Marshall B. Clinard : *THE BLACK MARKET*, N. Y. Rinehart, 1952.

20. Dr. Gilbert Geis : *SOCIOLOGICAL INQUIRY*, Vol. XXXII, No. 2 (1962), pp. 162-171.

violate the criminal law, usually by breach of trust, in the ordinary course of their business activities. This original usage accords with legal ideas of crime and points moreover to the significant and difficult problems of enforcement in the areas of business crimes, particularly where those violations are made criminal by recent statutory enactment. From this fruitful beginning the term has spread into vane, wide and handsome. We learn that the white-collar criminal may be the suave and deceptive merchant prince or "robber baron", that the existence of such crime may be determined readily "in casual conversation with a representative of an occupation by asking him, 'What crooked practices are found in your occupation?'"

Confusion grows as we learn from another proponent of this concept, "there are various phases of white-collar criminality that touch the lives of the common man almost daily. The large majority of them are operating within the letter and spirit of the law". Apparently the criminal may be law obedient but greedy; the specific quality of his crimes is far from clear.²¹

Another trend has been to include even those violations of law which are either not committed in the course of occupation or profession or where the violators are not necessarily of the upper strata or of recognised respectability. Violations like tax-evasion are examples of offences which are not committed in the course of occupation and they are committed by the tax payers of every strata. Similarly, shoplifting, which has been treated as a white-collar crime by some writers, is not necessarily committed by persons of any particular strata nor can it be said that shoplifting is in the course of one's occupation or profession. It emerges, therefore, that the term 'white-collar' crime does not convey the same meaning to all the persons. Broadly speaking the concept includes some of those acts which legally speaking, are not crimes and were not contemplated by Sutherland at the time when he made use of the term for the first time in criminology.

One objection regarding white-collar crimes is based on the concept of *mens rea* or guilty mind in criminal law. The traditional concept in criminal law is that no crime can be committed without a guilty mind. Many statutes dealing with white-collar crimes do not require any *mens rea* and writers like Jerome Hall do

21. Paul W. Tappan: WHO IS THE CRIMINAL, op. cit.

not, therefore, recognize them as real crimes but only as regulatory offences.²² It has, however, been held in many cases in England, India and some other countries that the doctrine of *mens rea* based on common law has no applicability in statutory crimes where the requirement of guilty mind may be excluded either expressly or by necessary implication.

Perhaps the most vehement critic of Sutherland's contribution to the study of white-collar crime is Dr. Gilbert Geis.²³ In one of his essays he comments on the loopholes in Sutherland's handling of white-collar crime as follows :

A major difficulty lies in Sutherland's striking inability to differentiate between the corporations themselves and their executive and personnel.

Geis has no problem in appreciating the criminal responsibility of the corporations or of their executives but he does not accept the proposition that a corporation is criminally liable for the acts of its executives. To support his contention, Geis offers an interesting though farfetched argument that declaring a corporation criminal because of the legal violations of its operators might be akin to declaring the State of Rhode Island criminal because one of its citizens is criminal.²⁴

Donald J. Newman has however supported Sutherland for including white-collar offences in the category of crimes for the purposes of criminological studies. According to Newman, there is no basic difference between the nature of ordinary and white-collar crimes. White-collar crimes, as well as the traditional offences, have their roots in common law and are adaptations of principles of theft, fraud, and the like to modern socio-economic institutions. The only peculiarity of white-collar offences is the relatively high status of the offenders but the criminal content in both the types is equally present. The farmer may water the milk and the television repairman may make unnecessary repairs. According to him, the white-collar regulations are intended to remedy, rather than to punish, but they are at least partially penal and triable in criminal courts.²⁵

22. Jerome Hall: *PRINCIPLES OF CRIMINAL LAW*, Ch. X.

23. Gilbert Geis, *op. cit.*, pp. 162-171.

24. *Ibid.*

25. See Donald J. Newman: *White-Collar Crime, Law and Contemporary Problems*, 23 : 735-53 (Autumn 1958).

The rise of white-collar criminality in many countries has coincided with the progress made in those countries in the economic and industrial fields. It is hardly surprising that the two processes should go together considering that most of the white-collar crimes are, directly or indirectly, connected with the production and distribution of wealth.

Writing about the various factors which have contributed substantially to white-collar criminality, Friedmann makes the following observations :

The Industrial Revolution had initiated great social changes of far-reaching consequences. The changes in the economic and social structure of property, comprising the transformation of an increasing proportion of wealth from property intangible, visible and mainly immovable goods into ownership in intangible and invisible powers and rights such as shares, trademarks, patents and copyrights, coincided with the growth of large-sized corporations replacing individual entrepreneurs. This development, *inter alia*, led to concentration of economic and consequent political power in a few hands, absentee ownership and impersonal monopoly, emphasis on money and credit and decline in the sense of social responsibility on the part of owners of large property.²⁶

The Law Commission has also noted the various factors responsible for the growth of white-collar criminality in the following words :

The advance of technological and scientific development is contributing to the emergence of "mass society", with a large rank and file and a small controlling elite, encouraging the growth of monopolies, the rise of a managerial class and intricate institutional mechanisms. Strict adherence to a high standard of ethical behaviour is necessary for the even and honest functioning of the new social, political and economic processes. The inability of all sections of society to appreciate in full this need results in the emergence and growth of white-collar and economic crimes ²⁷

The two world wars also contributed towards white-collar criminality in a substantial way. The traditional mores and ethical

26. Friedmann : *LAW IN A CHANGING SOCIETY* (1951), p. 186.

27. Law Commission of India, 29th Report (1966), p. 3.

restraints were vitally affected due to the scarcity of things and mounting demands. The end of the second world war almost coincided with the independence of India and the emergence of an avowedly welfare State in the country. In a welfare State, the government tends to control a vast number of means of production and distribution of goods and material services. Assuming that such controls are in the interests of the community the fact remains that the governmental controls provide a fertile source of white-collar criminality in society infested with chronic shortages, corruption and endemic inefficiency in the administration of the State activities.

The obligations imposed on the State regarding the ownership and distribution of the national wealth and resources shall be evident from the following provisions of the Indian Constitution :

The State shall in particular direct its policy towards securing—that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.²⁸

The above philosophy led to the various regulatory legislations, the breach of those regulations giving tremendous fillip to white-collar criminality in India.²⁹

During the last twenty-five years, the country has seen the execution of various five year plans involving huge expenditure by the government for the various nation-building activities. The corrupt officers, businessmen and contractors never had it so good. No doubt, the country did make some progress but a big chunk of money earmarked for developmental projects has been pocketed by the white-collar criminals.

Anti-White Collar Crimes Legislation—Problem of Enforcement

It has already been noted that the white-collar criminals are much more dangerous to the society than the ordinary or blue-collar

28. Article 39 (b) & (c).

29. Some of the relevant statutes are : Essential Commodities Act, 1955 ; Industrial (Development and Regulation) Act, 1951 ; Imports and Exports (Control) Act, 1947 ; Companies Act, 1956 ; Foreign Exchange (Regulation) Act, 1947.

criminals. The question then arises as to why many white-collar criminals go unpunished? According to Sutherland, the preferential treatment of white-collar offenders could be explained in terms of their high socio-economic status, the remedial philosophy of the laws in question and the relatively unorganized resentment of the public against white-collar crimes. The reasons for the absence of such resentment were stated to be as follows :

- (a) The violations of law in such cases are complex, and can be appreciated only by experts ;
- (b) The public agencies of communication (like the press) do not express the organised moral sentiments of the community, partly because the crimes are complicated and cannot be easily presented as news, but probably in a greater degree because these agencies of communication are themselves controlled by businessmen involved in the violations of many of these laws.
- (c) The laws for the regulation of business belong to a relatively new and specialised part of the statutes.

As to the reasons why such crimes went unpunished, Sutherland made the following observations :

The difference in the implementation of the criminal law is due principally to the difference in the social position of the two types of offenders. Because of their social status, implementation of the criminal law in relation to white-collar criminals becomes difficult. They are more powerful than the traditional criminals. Consumers, investors and stockholders are unorganised, lack technical knowledge and cannot protect themselves. White-collar crime goes undetected because it transcends the visibility of ordinary cheating practices of small merchants.

Another obstruction in the prosecution and punishment of the white-collar criminals is that the public is not only indifferent and apathetic towards such violations of law but quite often the members of the community themselves contribute to the commission of the various white-collar crimes. In other words, the 'victims' of the crimes are also to blame for white-collar criminality. In fact many such crimes cannot be committed unless there is a demand for illegal goods and services in a community. Blackmarketing

and illegal gratifications to public servants are some of the common examples.

Finally one more factor is believed to be responsible for the failure to punish or for the inadequate punishments so far as white collar crimes are concerned. The judges of the courts ordinarily belong to the upper strata of the society and this factor may determine their attitude, consciously or otherwise, towards the white-collar offenders who also come from the same social strata.

Judicial Attitude—Recent change

As discussed above, the courts generally have been giving differential treatment to the white-collar criminals. Sometimes instead of punishing the guilty, the courts have used cease-and-desist orders in case of white-collar criminals, a technique which is not resorted to for ordinary criminals. As pertinently observed by Taft and England, we do not warn the burglar to desist; we arrest him forthwith.³⁰ There, however, seems to have occurred stiffening of the judicial attitude in the U. S. A. recently as manifested in the famous case of the electrical equipment companies decided in the year 1961. In the words of Taft and England :

The plea of *nolo contendere* (no contest) by a person formally accused of a crime is a backhanded plea of guilty. For decades, businessmen accused of violating anti-trust laws have pleaded *nolo contendere* when the evidence against them was clearly overwhelming. Never, until 1959, did imprisonment follow such a plea. In that year, to their astonishment four Ohio businessmen were sentenced to jail for anti-trust violations. In February, 1961, 44 executives of 29 electrical equipment companies, including General Electric and Westinghouse, pleaded guilty or *nolo contendere* to charges of price-fixing and rigging bids on \$7 billion worth of heavy electrical equipment. In addition to fines ranging upto 12,500, 23 executives, one of whom was a Westinghouse vice-president were variously sentenced to 30 and 60 day jail terms. Most of these sentences were actually served. The extensive press coverage given to this incident was apparently based not upon the enormity of the crimes involved, but upon nationwide surprise at the jail sentences meted out and upon the verbal reprimands uttered by the sentencing judge.³¹

30. Op. cit., p. 202.

31. Taft and England, op. cit., p. 203.

Taft and England also note the significance of the *Time* magazine reporting the story in the 'Business' and not in the 'Crime' columns.³²

Extent of White-Collar Crimes

It is not easy to assess the true extent of white collar criminality in a community. Some of the reasons like complexity and impersonality of the offences and frequent lack of prosecutions and punishments for white-collar crimes have already been referred to in the discussion above. Moreover the usual sources of crime statistics do not give such information on the extent of white-collar crimes since they confine their interest to the cases tried in ordinary criminal courts and many white-collar crimes are dealt with by tribunals, administrative boards and commissions of enquiry. In the U. S. A., for example, there are no consolidated statistics for white-collar crimes comparable to the FBI's Uniform Crime Reports in the area of traditional crime. Many white-collar crimes are of relatively recent origin. Moreover, it is very difficult to obtain statistics about some types of white-collar crime. It is extremely difficult to discover the existence of such crimes as anti-trust violations and tax frauds.³³

In India, the crime statistics given in CRIME IN INDIA, compiled by the Bureau of Police Research and Development, Ministry of Home Affairs, provide hardly any information regarding the extent of white-collar criminality in the country. The only possible sources, therefore, are the reports of the Government of India and the findings of the various tribunals and commissions dealing with white-collar crimes.

Such information, as is available, indicates that white-collar crime is pervasive in almost all the professions and occupations in our society which is also true of many other countries including the United States of America where some scientific surveys have been carried out to find out the nature and extent of white-collar criminality. Sutherland's study of 70 of the largest American corporations, published in 1948, suggests that law violation is prevalent in large business enterprises. He examined the decisions of

32. Taft and England, op. cit., p. 203.

33. President's Commission on Law Enforcement and Administration of Justice, Task Force Report : CRIME AND ITS IMPACT.

courts and regulatory commissions under the anti-trust, false advertising, patent, copyright, and labour laws as they applied to corporations. During a 45 year period, he found that 980 adverse decisions had been rendered, of which 779 indicated that crimes had been committed. Every one of the 70 corporations had a decision against it and the average number was 14. 98% of the 70 corporations had at least four adverse decisions. About 60% of the 70 corporations had been convicted by criminal courts. They averaged approximately four convictions each. A study of blackmarket violations during World War II revealed that approximately one in every 15 of the three million business concerns in the country had been punished for serious violations of price regulations. The evidence showed that the total number of violations was much larger than indicated by officially imposed sanction.³⁴

The Readers' Digest staff in 1941 sought to document by experimentation the level of white-collar crime in a study of automobile garages, radio repair shops and watch repair shops. Investigators for the magazine disconnected a coil wire in an automobile, a relatively easily diagnosed problem, and then took the automobile to 347 garages in 48 States. Of these, 129 immediately noted the trouble, and either charged nothing or a nominal fee for the work. The remainder—63% of the garages—overcharged, inserted unnecessary parts, charged for work not done or for parts not needed, or took other similar action. Similarly, a radio in excellent working condition was taken to repair shops after one of the tubes had been loosened. Of 304 shops, 109 honestly identified the obvious difficulty, but the rest (almost two-thirds) treated it as a substantial repair problem. And, finally, the investigators loosened the small screw that fastens the winding wheel on a watch, and then requested a number of shops to repair it. In almost half of the cases the jewellers charged for cleaning work not performed, and for parts not needed or used.³⁵

Some idea about the amount of tax fraud can be formed by the fact that in 1964, with the inauguration of dividend and interest

34. The President's Commission Report on Law Enforcement and Administration of Justice, Task Force Report: CRIME AND ITS IMPACT—AN ASSESSMENT, pp. 102, 109.

35. *Ibid.*

reporting by banks and corporations to the taxpayer, there was a 45% increase in this type of income reflected on tax forms, and 28 per cent more income was collected from these sources.³⁶

The most comprehensive survey of attitudes by business executives toward management and corporate practices showed that many believed that unethical conduct and criminal activities are widespread. The sample consisted of executives subscribing to the Harvard Business Review. Almost half of the respondents agreed with the statement: "The American business executive tends to ignore the great ethical laws as they apply immediately to his work. He is preoccupied chiefly with gains." Four out of seven believed that businessmen "would violate a code of ethics whenever they thought they could avoid detection"³⁷.

White-collar crimes result in serious financial losses, to a single individual or to the business community or consumer public. The exact financial loss to the Government caused by tax fraud is difficult to determine but is undoubtedly enormous. Estimates of the amount of reportable income that goes unreported each year range from \$ 25 to \$ 40 billion. The financial loss to the public caused by a single conspiracy in restraint of trade may be untold millions in extra costs paid ultimately by the buying public. It is estimated that the cost to the public annually of securities, frauds, while impossible to quantify with any certainty, is probably in the \$ 500 million to 1 billion range. A conservative estimate is that nearly 500 million is spent annually on worthless or extravagantly misrepresented drugs and therapeutic devices. Fraudulent and deceptive practices in the home repair and improvement field are said to result in \$ 500 million to 1 billion losses annually; and in the automobile repair field alone, fraudulent practices have been estimated to cost \$ 100 million annually. Individual white-collar criminals are sometimes responsible for losses that are quite beyond the scale of most traditional crimes. Billy Sol Estes' \$ 30 million fertilizer swindle and De Angelis' \$ 125-\$ 175 million vegetable oil scandal are two notable examples.³⁸

36. Sheldon S. Cohen : *Morality and the American Tax System*, George Washington University Law Review, 1966, 35 : 839, 840.

37. Raymond C. Baumhar : *How Ethical Are Businessmen?* Harvard Business Review, July-August, 1961.

38. President's Commission, Task Force Report, op. cit.

The above figures give some estimate of the financial losses due to white-collar crimes in the most affluent country in the world. Loss to human life and body is also caused due to some white-collar crimes which cannot be computed in terms of money. In India, scientific studies and surveys relating to the extent of white-collar criminality have not been carried out as in the U.S.A. It is obvious that white-collar criminality in a country like India should be far less than the U. S. A. Nevertheless the problem is quite acute in India, both in terms of variety and the extent of white-collar criminality as will be evident from the following discussion.

The Vivian Bose Commission, appointed to probe into the working of ten companies in the Dalmia-Jain group, found that there was a loss of an estimated 3.5 crores of rupees as a result of fraud and improper use of funds of the concerned companies by the management.³⁹

The Santhanam Committee appointed to report on the corruption in the country, found that during the five year period from 1958 to 1962 licences valued at seventy million rupees were obtained or wrongfully utilised by nearly 700 firms through misrepresentation, forgery or other breaches of the export/import control regulations.⁴⁰

Illegal accumulation of foreign exchange through just one type of fraud—*i. e.* under-invoicing/over-invoicing of imports and exports—is calculated to be between Rs. 40 to 50 crores every year.⁴¹

In 1956 the amount of income-tax lost through tax evasion was estimated at Rs. 300 crores per year.⁴²

Explanation of White-Collar Criminality

The various theories developed to explain traditional crime cannot apparently explain the criminal tendencies of the upper strata since those theories are relevant by and large in the context

39. Vivian Bose Report (1963), Chapter IV.

40. Report of Santhanam Committee on the Prevention of Corruption, 1964, p. 18 and p. 65.

41. Economic Review, January 28, 1964 at p. 28.

42. Prof. Nicholas Kaldor : INDIAN TAX REFORM (1956), p. 105.

of criminals of the lower strata. Sutherland wrote in *CRIMES OF CORPORATION* as follows :

It is very clear that the criminal behaviour of businessmen cannot be explained by poverty, in the usual sense, or by bad housing or lack of recreational facilities or feeble-mindedness or emotional instability. Business leaders are capable, emotionally balanced, and in no sense pathological.

The only plausible theory may be the explanation offered by Bonger which to a great extent fits in with the case of white-collar offenders. In a capitalistic society acquisition of maximum material resources by individuals is regarded not only legitimate but also essential. The only measuring rod of success is the quantum of money one is able to amass in the name of open competition, economy and individual freedom. The inevitable result is the large scale exploitation of public by businessmen and the professionals in course of their occupational activities. Since the motivating force to commit white-collar crimes is provided by the overall system itself; various legislations and regulations to curb white-collar criminality are bound to be ineffective to a great extent.

Differential Association

Sutherland sought to give an explanation of white-collar crime on the basis of his differential-association theory but cautiously concluded that white-collar crime has not yet been fully explained. According to him, some white-collar offences represent "normal" business procedures which are passed on as a part of the occupational sub-culture. Such procedures are rationalised by resorting to the ideology 'business is business'. A new entrant to a business activity not only learns all the unethical practices but is also sometimes made to use such tactics by his superiors in the establishment. The rapid pace of social change and the technical complexity of business affairs have aggravated social disorganization favourable to unethical business practices.⁴³

Clinard while agreeing with the 'differential association' approach of Sutherland is of the view that all cases cannot be explained by the theory. Many businessmen do not commit such

43. *WHITE-COLLAR CRIME*, Chapter XIV.

offences despite their knowledge of the techniques employed in these crimes.⁴⁴

Rationalizations of White-Collar Offences

Donald R. Crassey believes that the rationalization of white-collar offences by white-collar people can offer a better explanation than the mathematical type of differential-association theory advanced by Sutherland. In his study of embezzlement Crassey found that offenders rationalized on the basis "that 'everyone' in business in some way or other converts or misapplies deposits so that it is not entirely wrong".⁴⁵

Mary Cameron's study⁴⁶ of middle-class shoplifters who had stolen from a large department store in Chicago gave some indication that many offenders did not think of themselves as thieves. "Even when arrested, they resist strongly being pushed to admit their behaviour is theft" observes Cameron. Interrogation procedures at the store are directed specifically and cautiously toward breaking down any illusion that the shoplifter may possess that his behaviour is merely regarded as "naughty" or "bad".

Many offenders found guilty of price-fixing in the U. S. A. genuinely thought that they were serving the community by 'stabilising' the prices.

White-Collar Crimes in India

In the foregoing discussion, the various aspects of the white-collar crimes viz. its definition, nature, extent, causative and contributive factors and the difficulties in the enforcement of laws in the area were discussed. What follows now is a brief discussion relating to some of the more important white-collar crimes in India.

Business, Trade, Commerce and Industry

Sutherland emphasised the high degree of criminality among businessmen in the contemporary society and their immunity from criminal sanctions generally in the following words :

The most powerful group in medieval society secured relative immunity from punishment by 'benefit of clerk' and

44. THE BLACK MARKET, p. 309.

45. OTHER PEOPLE'S MONEY, p. 102.

46. THE BOOSTER AND THE SWITCH (New York : The Free Press, 1966), p. 162.

now the present most powerful group secures relative immunity by benefit of business.⁴⁷

What Sutherland wrote about the American society is equally true of the conditions in India. The Santhanam Committee gave a graphic account of the misdeeds of the businessmen and the industrialists in the following words :

Corruption can exist only if there is someone willing to corrupt and capable of corrupting. We regret to say that both this willingness and capacity to corrupt is found in a large measure in the industrial and commercial classes To these, corruption is not only an easy method to secure large unearned profits, but also the necessary means to enable them to be in a position to pursue their vocations or retain their position among their own competitors. It is these persons who indulge in evasion and avoidance of taxes, accumulate large amounts of unaccounted money by various methods such as obtaining licences in the names of bogus firms and individuals, trafficking in licences suppressing profits by manipulation of accounts to avoid taxes. . . and under-valuation of transactions in immovable property. It is they who have control over large funds and are in a position to spend considerable sums of money in entertainment. It is they who maintain an army of liaison and contact men, some of whom live, spend and entertain ostentatiously. We are unable to believe that so much money is being spent only for the purpose of getting things done quickly Contractors and suppliers who have perfected the art of getting business by under-cutting, of making good the loss by passing off sub-standard works and goods generally spare no pain or expenditure in creating a favourable atmosphere. Possession of large amounts of unaccounted money by various persons including those belonging to the industrial and commercial classes is a major impediment in the purification of public life. If anti-corruption activities are to be successful it must be recognised that it is as important to fight these unscrupulous agencies of corruption as to eliminate corruption in the public services. In fact they go together.

Commenting on the extremely dishonest behaviour of the Indian traders, it has rightly been observed :

Business communities in India of large and small merchants, are basically a dishonest bunch of crooks While it is true that the object of businessmen is to make profit, there are degrees and degrees of making profit, and nowhere in the

47. Sutherland : *WHITE COLLAR CRIME*, (1961), p. 47.

world do businessmen get rich so quickly as they do in India ⁴⁸

The two instances of big-business criminality are provided by reports made by the commissions dealing with the notorious Dalmia-Jain and Mundhra cases. The Vivian Bose Commission, which enquired into the affairs of Dalmia-Jain group of companies, the third biggest in the country, held them responsible in different degrees for fraud, mismanagement, manipulation of accounts, destruction of records, personal gain at the expense of the investing public, avoidance of taxes and a number of other irregularities and violations of trust.⁴⁹

Mr. M. C. Chagla, who probed into the working of Mundhra concerns had to make the following observations about the business tycoon: "Mundhra is a flamboyant personality and a financial adventurer whose only ambition is to build up an industrial empire by dubious means." The reports of the Company Law Administration record about 124 prosecutions against Mundhra, and companies owned or controlled by him between the year 1958 to 1960 in various courts in the country. During this two-year period, 113 ended in conviction.⁵⁰

Hoarding, profiteering and blackmarketing of essential commodities by traders in India has become a chronic problem. Commenting on it, the Monopolies Inquiry Commission gives the graphic picture of the situation as follows:

There is hardly anybody in India who has not been a victim of the practice of hoarding, cornering and profiteering. Whenever there is a slight shortage—even temporary—in any consumer goods for which the demand is urgent and inelastic, almost every trader—it is perhaps unnecessary to use the qualification 'almost'—conceals his stock and blindly tells the customers that he has not got the commodity in stock, often putting the blame on producers for keeping him in short supply. After some time when the customer can no longer do without the goods, he proceeds to dispose of his stock at exorbitant

48. Winifred Bose: *The Trader* in 'Opinion', quoted by N.R.M. Menon in his unpublished thesis *A SOCIO-LEGAL STUDY OF WHITE-COLLAR CRIME IN INDIA*, 1968.

49. Report of the Vivian Bose Commission of Inquiry (1963).

50. Third and Fourth Annual Reports on the working of the Indian Companies Act, 1956, Govt. of India.

prices Wheat, rice, sugar, edible oils, drugs, babyfood—each of these commodities and many others have had their share of hoarding and cornering practice. . . . They have been called wicked, anti-social, criminal, but still these make their appearance every time there is any apprehension of even a slight shortage of such commodities.⁵¹

Another white-collar crime, which is quite prevalent among businessmen, is the violation of Foreign Exchange Act and Import and Export Act. According to the Santhanam Committee report, secret hoards of foreign exchange are built up abroad by Indian businessmen through under-invoicing of exports and over-invoicing of imports.⁵²

A number of other offences are also committed by businessmen which require separate treatment due to their gravity. Some of them, like tax-evasion, are not confined to businessmen alone.

Food and Drug Adulteration

This is easily the most atrocious crime committed by businessmen since it can cause irreparable damage to the health or even lives of the innocent citizens. In India, the problem is so widespread that from 25 per cent to 70 per cent of most of the food-stuffs consumed in this country are adulterated or contaminated.⁵³ The same is true of the production of spurious drugs in the country. According to the Pharmaceutical Enquiry Committee, Government of India, the spurious drugs trade flourishes in India to a colossal extent. This is due to the greed of the manufacturers, ignorance of the poor consumers who go in for cheap medicines from unauthorised dealers and the shortage of genuine goods.⁵⁴

Public opinion is so strong regarding adulteration laws in the country that a comment, signed by several citizens residing in West Bengal and submitted to the Law Commission, suggested that persons guilty of adulteration of medicines and food should be punished with death and life imprisonment respectively, their property should be confiscated and publicity be given of their misdeeds

51. Report of the Monopolies Inquiry Commission (1965), p. 162.

52. Santhanam Committee Report, p. 253.

53. Swasth Hind, Ministry of Health, Government of India, March, 1963, quoted by Menon, op. cit.

54. Pharmaceutical Enquiry Committee, Ministry of Commerce and Industry, (1954), pp. 146-147, quoted by Menon op. cit.

through mass media.⁵⁵ The Law Commission, however, did not consider the suggestion since the issue was not in its contemplation.

Prosecutions under the Prevention of Food Adulteration Act fail quite frequently because of defective reports of the public analysts, or delay in the examination of samples or because the procedure prescribed by the Act for taking samples is not followed.⁵⁶

Pointing out the difficulties involved in prosecuting the offenders under the Act, the Law Commission observed :

It should be noted that in contested cases, where the Inspector of the Department is pitted against a lawyer professionally skilled in the procedure of court work (and perhaps also more familiar with the particular practices and foibles of the magistrates before whom the less forensically able inspectors do incur the displeasure of the court by lack of familiarity with some of the legal refinements or by the unnecessary labouring of points which are not in issue). In extreme cases, this lack of legal expertise may even result in an unjustified acquittal, where, for example, the inspector is temporarily thrown off his step by a clever, if rather specious, legal point or procedural manoeuvre.⁵⁷

The Commission concluded by observing :

. . . the most significant feature of the prosecution process, is undoubtedly the difference between the departmental inspector's view of the case and that which, in the event, he is able to give to the magistrate. The inspector's view of the case is obviously coloured by his involvement in what may have been a lengthy series of visits and discussions with the accused and by his knowledge of the past history of the dealings with the accused over the previous five or six years. The magistrate, on the other hand is only permitted to hear the details of the particular incident with which the proceedings are concerned, and in addition he must pay some attention at least to the mitigating circumstances which defence counsel will put before him.

Violations of Taxation Laws

Some of the more important and frequent tax-violations which occur in India are in the areas of income tax, wealth tax, estate duty and sales tax. The loss resulting due to the violations

55. See 29th report of the Law Commission, p. 71.

56. Law Commission, 47th Report, Social & Economic Offences, p. 83.

57. *Ibid*, p. 34.

to the State exchequer is tremendous. Apart from the financial implications of the problem, there are other dimensions of the evil like corrupting influence of the tainted money on the governmental machinery and the consequent contempt, disrespect and cynicism towards law in general.

Extent of the Problem

The tax-laws in India are generally too complex and cumbersome to be administered smoothly. Those who are determined to evade taxation, never fail to detect the loopholes in the relevant statutes and, therefore, manage to manipulate their affairs accordingly.

It is almost impossible to have even a rough estimate of the extent of the tax evasion in the country. The tax authorities find themselves in an unenviable situation when trying to assess the incomes of businessmen, contractors, lawyers, doctors and persons connected with the film industry. Unlike many countries, professional people in India are rarely paid through cheques and this makes the tax violations easier for them. Even if payment is made through cheque, the sum thus paid may represent only a small fraction of the actual amount paid and the rest is paid in what has come to be known as black money. As given in the Santhanam Committee report, an unofficial estimate of the Central Board of Revenue is that about Rs. 45 crores of tax is evaded annually by assesseees in the higher income groups, the evaded income being about Rs. 230 crores. Obviously the figures must have gone up much higher since then due to the unprecedented inflation faced by the Indian economy during the last few years.

Probably the greatest menace caused by the failure to check tax-evasion is the phenomenon of black money which has serious repercussions on the economy of the country. It is common knowledge that at present two parallel economies as represented by black and white money are going on side by side in the country. In its inquiry on the administration of the Dalmia-Jain companies the Vivian Bose Commission found 114 fictitious persons to whom shares worth Rs. 16 lakhs were fraudulently issued in order to bring the secret profits of the Dalmia-Jain group into circulation and

convert it into what is known as "white money". The Commission also observed from what had happened before the Income Tax Investigation Commission that the group did have over Rs. 4 crores of secret and undisclosed assets down to the year 1947. The Commission also estimated the gains made at the cost of the exchequer by just four companies of the Dalmia-Jain group by evading or avoiding taxes to the tune of Rs. 1,45,19,790. The methods employed for this purpose included compensation payment for termination of selling and managing agencies, understatement of sales, suppression of profits, fictitious losses in shares etc.⁵⁸

Tax Evasion and Tax Avoidance

A distinction is maintained in law between the concepts known as tax evasion and tax avoidance. While for the purposes of sociological studies, there is hardly any real distinction between the two, in the eye of law, the former is a crime while the latter is regarded as perfectly legitimate. It has, therefore, been, rightly said that the real dangerous tax offender does not evade but avoids paying taxes. The courts in India have recognised the distinction between evasion and avoidance and the following observations of a judge of the Bombay High Court sum up the matter succinctly:

A citizen is perfectly entitled to exercise his ingenuity so as to arrange his affairs as may make it possible for him legally and lawfully not to pay tax, and if his ingenuity succeeds, however reluctant the Court may be to acknowledge the cleverness of the assessee, the Court must give effect to the letter of the taxation law rather than strain that letter against the assessee.⁵⁹

The approach reflected in the judgment is in line with the basic principle of criminal law that no act can be declared a crime without an express law forbidding and punishing the particular act. Nevertheless the fact remains that such an interpretation of tax statutes gives a long rope to those who have scant respect for the taxation laws.

58. Report of the Vivian Bose Commission, quoted in N. R. Menon: *WHITE COLLAR CRIME IN INDIA*, 1968.

59. *Provident Investment Company v. I. T. C.*, AIR 1954 Bom 95.

Corruption in Government and Politics

Corruption is one of the most talked about subjects today in the country since it is believed to have penetrated into every sphere of governmental and political activity. Corruption of various forms has always existed not only in India but also in countries which are materially and politically more advanced. What distinguishes India from other societies is the variety and degree of corruption afflicting our society. To quote James Cameron, an eminent journalist of Fleet Street :

In India, corruption, public or private venality, is sanctified by the oldest traditions, it is denied by nobody, indeed, the totality and pervasiveness of Indian corruption is almost a matter of national pride. Just as India's draughts are the driest, her famines the most cruel, the overpopulation the most uncontrollable, so are all aspects of India's corruption and bribery the most wholly widespread and spectacular.

Corruption in the modern context has acquired much wider connotation compared to the traditional meaning given to the term which was confined to the concept of bribes or illegal gratifications taken by the public servants. In its wider sense, corruption includes all forms of dishonest gains in cash, kind or position by persons in government and those associated with public and political affairs.

Corruption in Government

Various factors have been responsible for the widespread corruption among government servants. While some factors are the same as in case of white-collar crimes in general, there are some factors which have a special bearing on the problem of corruption among government and other public servants. The two world wars gave vast powers to the government servants in matters relating to the grant of licences, permits and quotas. This was a potentially dangerous situation in view of the acute shortage of essential commodities and many government employees made good use of the opportunities to make quick money. After the second world war, the newly acquired independence brought many more opportunities to the corrupt officials. Not only that the governmental participation in the various economic activities created better opportunities for the corrupt persons, they also benefitted by the general fall in the discipline and efficiency in the

public services. It is not infrequent that politicians come to the rescue of the guilty person provided he has the right connections. The constitutional protections given to the government servants are meant to prevent victimisation but quite frequently those rights also create hurdles in giving punishment to those who deserve it.

Some other factors which make public servants corrupt are connected with the economic conditions of most of the government employees. In India, though the government services have some special prestige, the salaries given to the employees, by and large, are quite low. This factor in combination with some other factors like inflation contributes a great deal towards corruption. The two government departments which have been traditionally notorious for corruption in this country are those of police and public works. Fortunately the judiciary has been by and large free from corruption so far but lately some unhealthy trends have set in so far the subordinate judicial officers are concerned.⁶⁰

Political Corruption

The corruption among ministers and other political personages is more dangerous than the corruption in the governmental machinery in terms of the enormity of the stakes involved in the public life. The corruption and indecency in political life informs all the sections of the society since violations are committed by those very persons who are expected to set the norms of social and political conduct. It is common knowledge that many politicians in power and their kith and kin have reaped good harvest in terms of big money and good positions through the abuse of government machinery at their disposal. The Santhanam Committee noted that while there were elaborate rules to ensure probity among officials, there were none for ministers, legislators and political parties.⁶¹

The more usual forms of political corruption in India are grafts, violation of election laws and the abuse of official and political machinery because of the liaison of political forces with

60. In quite a few decided cases, magistrates have been found guilty of corruption. In Delhi as many as four civil judges have been removed from their office in the recent past.

61. Santhanam Committee Report, pp. 101-102.

big business. The well known episodes known as Mundhra and Sirajuddin affairs involving central cabinet ministers are typical examples of political corruption. More recently there was the license scandal in which quite a few members of the Parliament were implicated.⁶²

White Collar Crime in the Professions

Among the many professions where the opportunities for committing white-collar crimes are frequent the professions which come readily to one's mind are those of Medicine and Law.

The majority of the people belonging to the medical profession may not commit criminal or unethical acts in the course of their profession but still the number of those who violate the professional and legal norms is not insignificant. The most common instances are illegal abortions, false medical certificates and unnecessary prolonged treatment in many cases. Another widespread violation consists of prescribing medicines which one is not supposed to have regard to his training or the system of medicine permitted to be followed by him. For instance some of the medicines of the allopathic system like antibiotics are freely administered by many physicians practising in the Unani or Ayurvedic system without having the faintest idea of the properties and the possible repercussions of those medicines.

White-collar criminality among lawyers is believed to be fairly widespread. Though such criminality is to be found in many countries, the situation in India is further aggravated by the fact that there are too many lawyers having regard to the work available to them with the result that all sorts of unscrupulous practices have crept into the profession. It is not surprising, therefore, that the image of a typical lawyer is far from being complimentary in India.⁶³

The usual legal and professional violations committed by lawyers are: advising organized criminals, aiding in preferring false claims and fabricating false evidence. Barnes and Tetters make the following comment quite apt in this context:

A lawyer must do his duty in defending a person accused of crime. This applies equally to those from known criminal

62. Tul Mohan Ram episode.

63. See *M. V. Dabholkar v. State of Maharashtra*, (1975) 2 SCC 702.

elements. There is a distinction between a criminal lawyer and a lawyer-criminal. So long as he handles his defence in a legal and ethical manner he is only dispatching his duty as an attorney. It is when he carries his defence beyond the law and the ethical standards of his profession that he may be labelled a lawyer-criminal.⁶⁴

64. Barnes & Tetters, *supra*, p. 49.

Appendix 1

THE CHILDREN ACT, 1960

[Act No. 60 of 1960]

[26th December, 1960]

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An Act to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children in the Union territories

Statement of Objects and Reasons.—Children are the most vulnerable group in any population and in need of the greatest social care. On account of their vulnerability and dependence they can be exploited, ill-treated and directed into undesirable channels by anti-social elements in the community. The State has the duty of according proper care and protection to children at all times, as it is on their physical and mental well-being that the future of the nation depends. With increased industrialisation and urbanisation, the State needs to be even more alert and vigilant in this respect. This Bill provides for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children in the Union territories for which the Central Government has direct responsibility.

It should also be remembered that the children often become delinquent by force of circumstances and not by choice. By improving the unfavourable environment and giving suitable training, it is possible to reform his anti-social attitudes and to mould him into a responsible citizen. Measures for juvenile delinquents should, therefore, aim at rehabilitation rather than punishment. The programmes proposed to be undertaken under this Bill are meant to be of a positive character.

At present Bombay Children Act, 1924, is in force in Delhi. It was considered whether a replacement of this outmoded Act by the Bombay Children Act, 1948 would not achieve the aims and objects referred to above. It was

found that the Bombay Children Act, 1948 or any other State Act for that matter would not fully meet the needs of the Union territories. As such the present Bill which takes into account the special needs of the Union territories has been prepared. (*Gazette of India, Extra.*, 1959, Part II, Section 2, p. 1487).

Be it enacted by Parliament in the Eleventh Year of the Republic of India as follows :

CHAPTER I

Preliminary

1. Short title, extent and commencement.—(1) This Act may be called the Children Act, 1960.

(2) It extends to all the Union territories.

(3) It shall come into force in any Union territory on such date as the Administrator may, by notification in the *Official Gazette*, appoint and different dates may be appointed for different areas thereof.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) “Administrator” means the administrator of a Union territory, whether called a Lieutenant Governor, a Chief Commissioner or by any other name ;

(b) “begging” means—

(i) soliciting or receiving alms in a public place or entering on any private premises for the purpose of soliciting or receiving alms, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise ;

(ii) exposing or exhibiting with the object of obtaining or extorting alms any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal ;

(iii) allowing oneself to be used as an exhibit for the purpose of soliciting or receiving alms ;

(c) “Board” means a Child Welfare Board constituted under Section 4 ;

(d) “brothel”, “prostitute”, “prostitution” and “public place” shall have the meanings respectively assigned to them in the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956) ;

- (e) "child" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years ;
- (f) "children's court" means a court constituted under Section 5 ;
- (g) "children's home" means an institution established or certified by the Administrator under Section 9 as a children's home ;
- (h) "competent authority" means, in relation to neglected children, a Board constituted under Section 4 and, in relation to delinquent children a children's court constituted under Section 5, and where no such Board or children's court has been constituted, includes any court empowered under sub-section (2) of Section 7 to exercise the powers conferred on a Board or children' court ;
- (i) "dangerous drug" shall have the meaning assigned to it in the Dangerous Drugs Act, 1930 (2 of 1930) ;
- (j) "delinquent child" means a child who has been found to have committed an offence ;
- (k) "guardian" in relation to a child, includes any person who, in the opinion of the competent authority having cognizance of any proceeding in relation to a child, has, for the time being, the actual charge of, or control over, that child ;
- (l) "neglected child" means a child who—
 - (i) is found begging ; or
 - (ii) is found without having any home or settled place of abode or any ostensible means of subsistence or is found destitute, whether he is an orphan or not ; or
 - (iii) has a parent or guardian who is unfit to exercise or does not exercise proper care and control over the child ; or
 - (iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life ;
- (m) "observation home" means any institution or place

established or recognised by the Administrator under Section 11 as an observation home ;

- (n) "offence" means an offence punishable under any law for the time being in force ;
- (o) "prescribed" means prescribed by rules made under this Act ;
- (p) "probation officer" means an officer appointed as a probation officer under this Act or under the Probation of Offenders Act, 1958 (20 of 1958) ;
- (q) "special school" means an institution established or certified by the Administrator under Section 10 ;
- (r) "supervision" in relation to a child placed under the care of any parent, guardian or other fit person under this Act, means the supervision of that child by a probation officer for the purpose of ensuring that the child is properly looked after and that the conditions imposed by the competent authority are complied with ;
- (s) all words and expressions used but not defined in this Act and defined in the Code of Criminal Procedure, 1898 (5 of 1898), shall have the meanings assigned to them in that Code.

3. Continuation of inquiry in respect of child who has ceased to be child.—Where an inquiry has been initiated against a child and during the course of such inquiry the child ceases to be such, then, notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a child.

CHAPTER I

Competent authorities and institutions for children

4. Child Welfare Boards.—(1) The Administrator may, by notification in the *Official Gazette*, constitute for any area specified in the notification, one or more Child Welfare Boards for exercising the powers and discharging the duties conferred or imposed on such Board in relation to neglected children under this Act.

(2) A Board shall consist of a chairman and such other members as the Administrator thinks fit to appoint, of whom not less than one shall be a woman; and every such member shall be vested with the powers of a magistrate under the Code of Criminal Procedure, 1898 (5 of 1898).

(3) The Board shall function as a Bench of magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1898 (5 of 1898), on a magistrate of the first class.

5. Children's courts.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), the Administrator may, by notification in the *Official Gazette*, constitute for any area specified in the notification, one or more children's courts for exercising the powers and discharging the duties conferred or imposed on such court in relation to delinquent children under this Act.

(2) A children's court shall consist of such number of magistrates forming a Bench as the Administrator thinks fit to appoint, of whom one shall be designated as the senior magistrate and not less than one shall be a woman; and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1898 (5 of 1898), on a magistrate of the first class.

6. Procedure, etc., in relation to Boards and children's courts.—(1) In the event of any difference of opinion among the members of a Board or among the magistrates of a children's court, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the chairman or of the senior magistrate, as the case may be, shall prevail.

(2) A Board or children's court may act notwithstanding the absence of any member of the Board or, as the case may be, any magistrate of the children's court, and no order made by the Board or children's court shall be invalid by reason only of the absence of any member or magistrate, as the case may be, during any stage of the proceeding.

(3) No person shall be appointed as a member of the Board or as a magistrate in the children's court unless he has, in the opinion of the Administrator, special knowledge of child psychology and child welfare.

7. Power of Board and children's court.—(1) Where a Board or a children's court has been constituted for any area, such Board or court shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with all proceedings under this Act relating to neglected children or delinquent children, as the case may be.

(2) Where no Board or children's court has been constituted for any area, the powers conferred on the Board or the children's court by or under this Act shall be exercised in that area, only by the following, namely—

- (a) the district magistrate ; or
- (b) the sub-divisional magistrate ; or
- (c) any magistrate of the first class.

(3) The powers conferred on the Board or children's court by or under this Act may also be exercised by the High Court and the court of session, when the proceeding comes before them in appeal, revision or otherwise.

8. Procedure to be followed by a magistrate not empowered under the Act.—(1) When any magistrate not empowered to exercise the powers of a Board or a children's court under this Act is of opinion that a person brought before him under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a child, he shall record such opinion and forward the child and the record of the proceedings to the competent authority having jurisdiction over the proceeding.

(2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the child had originally been brought before it.

9. Children's homes.—(1) The Administrator may establish and maintain as many children's homes as may be necessary for the reception of neglected children under this Act.

(2) Where the Administrator is of opinion that any institution other than an institution established under sub-section (1) is fit for the reception of the neglected children to be sent there under this Act, he may certify such institution as a children's home for the purposes of this Act.

(3) Every children's home to which a neglected child is sent under this Act shall not only provide the child with accommodation, maintenance and facilities for education, but also provide him with facilities for the development of his character and abilities and give him necessary training for protecting himself against moral dangers or exploitation and shall also perform such other functions as may be prescribed.

(4) The Administrator may, by rules made under this Act provide for the management of children's homes and the circumstances under which, and the manner in which, the certificate of a children's home may be granted or withdrawn.

10. Special schools.—(1) The Administrator may establish and maintain as many special schools as may be necessary for the reception of delinquent children under this Act.

(2) Where the Administrator is of opinion that any institution other than an institution established under sub-section (1) is fit for the reception of the delinquent children to be sent there under this Act, he may certify such institution as a special school for the purposes of this Act.

(3) Every special school to which a delinquent child is sent under this Act shall not only provide the child with accommodation, maintenance and facilities for education but also provide him with facilities for the development of his character and abilities and give him necessary training for his reformation and shall also perform such other functions as may be prescribed.

(4) The Administrator may, by rules made under this Act, provide for the management of special schools and the circumstances under which, and the manner in which, the certificate of a special school may be granted or withdrawn.

11. Observation homes.—(1) The Administrator may establish and maintain as many observation homes as may be necessary for the temporary reception of children during the pendency of any inquiry regarding them under this Act.

(2) Where the Administrator is of opinion that any institution other than an institution established under sub-section (1) is fit for the temporary reception of children during the pendency of any

inquiry regarding them under this Act, he may recognise such institution as an observation home for the purposes of this Act.

(3) Every observation home to which a child is sent under this Act shall not only provide the child with accommodation, maintenance and facilities for medical examination and treatment, but also provide him with facilities for useful occupation.

(4) The Administrator may, by rules made under this Act, provide for the management of observation homes and the circumstances under which, and the manner in which, an institution may be recognised as an observation home or the recognition may be withdrawn.

12. After-care organisations.—(1) The Administrator may, by rules made under this Act, provide for the establishment or recognition of after-care organisations and may vest them with such powers as may be necessary for effectively carrying out their functions under this Act.

(2) Every such organisation shall take care of the children when they leave children's homes or special schools and shall, for the purpose of enabling them to lead an honest, industrious and useful life, take all such measures as it may deem necessary or as may be prescribed.

CHAPTER III

Neglected children

13. Production of neglected children before Boards.—

(1) If any police officer or any other person authorised by the Administrator in this behalf, by general or special order, is of opinion that a person is apparently a neglected child, such police officer or other person may take charge of that person for bringing him before a Board.

(2) When information is given to an officer-in-charge of a police station about any neglected child found within the limits of such station, he shall enter in a book to be kept for the purpose the substance of such information and take such action thereon as he deems fit and if such officer does not propose to take charge of the child, he shall forward a copy of the entry made to the Board.

(3) Every child taken charge of under sub-section (1) shall be brought before the Board within a period of twenty-four hours of

such charge taken excluding the time necessary for the journey from the place where the child had been taken charge of to the Board.

(4) Every child taken charge of under sub-section (1) shall, unless he is kept with his parent or guardian, be sent to an observation home (but not to a police station or jail) until he can be brought before a Board.

14. Special procedure to be followed when neglected child has parent.—(1) If a person, who in the opinion of the police officer or the authorised person is a neglected child, has a parent or guardian who has the actual charge of, or control over, the child, the police officer or the authorised person may, instead of taking charge of the child, make a report to the Board for initiating an inquiry regarding that child.

(2) On receipt of a report under sub-section (1), the Board may call upon the parent or guardian to produce the child before it and to show cause why the child should not be dealt with as a neglected child under the provisions of this Act and if it appears to the Board that the child is likely to be removed from its jurisdiction or to be concealed, it may immediately order his removal (if necessary by issuing a search warrant for the immediate production of the child) to an observation home.

15. Inquiry by Board regarding neglected children.—(1) When a person alleged to be a neglected child is produced before a Board, it shall examine the police officer or the authorised person who brought the child or made the report and record the substance of such examination and hold the inquiry in the prescribed manner and may make such orders in relation to the child as it may deem fit.

(2) Where a Board is satisfied on inquiry that a child is a neglected child and that it is expedient so to deal with him, the Board may make an order directing the child to be sent to a children's home for the period until he ceases to be a child :

Provided that the Board may, for reasons to be recorded, extend the period of such stay, but in no case the period of stay shall extend beyond the time when the child attains the age of eighteen years, in the case of a boy or twenty years, in the case of a girl :

Provided further that the Board may, if it is satisfied that having regard to the circumstances of the case it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

(3) During the pendency of any inquiry regarding a child, the child shall, unless he is kept with his parent or guardian, be sent to an observation home for such period as may be specified in the order of the Board :

Provided that no child shall be kept with his parent or guardian if, in the opinion of the Board, such parent or guardian is unfit to exercise or does not exercise proper care and control over the child.

16. Power to commit neglected child to suitable custody.—(1) If the Board so thinks fit, it may, instead of making an order under sub-section (2) of Section 15 for sending the child to a children's home, make an order placing the child under the care of a parent, guardian or other fit person, on such parent, guardian or fit person executing a bond with or without surety to be responsible for the good behaviour and well-being of the child and for the observance of such conditions as the Board may think fit to impose.

(2) At the time of making an order under sub-section (1) or at any time subsequently, the Board may, in addition, make an order that the child be placed under supervision for any period not exceeding three years in the first instance.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), if at any time it appears to the Board, on receiving a report from the probation officer or otherwise, that there has been a breach of any of the conditions imposed by it in respect of the child, it may, after making such inquiry as it deems fit, order the child to be sent to a children's home.

17. Uncontrollable children.—Where a parent or guardian of a child complains to the Board that he is not able to exercise proper care and control over the child and the Board is satisfied on inquiry that proceedings under this Act should be initiated regarding the child, it may send the child to an observation home and make such further inquiry as it may deem fit and the

provisions of Section 15 and Section 16 shall, as far as may be, apply to such proceedings.

CHAPTER IV

Delinquent Children

18. Bail and custody of children.—(1) When any person accused of a bailable or non-bailable offence and apparently a child is arrested or detained or appears or is brought before a children's court, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any reputed criminal or expose him to moral danger or that his release would defeat the ends of justice.

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause him to be kept in an observation home in the prescribed manner (but not in a police station or jail) until he can be brought before a children's court.

(3) When such person is not released on bail under sub-section (1) by the children's court, it shall, instead of committing him to prison, make an order sending him to an observation home for such period during the pendency of the inquiry regarding him as may be specified in the order.

19. Information to parent or guardian or probation officer.—Where a child is arrested, the officer-in-charge of the police station to which the child is brought shall, as soon as may be after the arrest, inform—

- (a) the parent or guardian of the child, if he can be found, of such arrest and direct him to be present at the children's court before which the child will appear; and
- (b) the probation officer of such arrest in order to enable him to obtain information regarding the antecedents and family history of the child and other material circumstances likely to be of assistance to the children's court for making the inquiry.

20. Inquiry by children's court regarding delinquent children.—Where a child having been charged with an offence appears or is produced before a children's court, the children's court shall hold the inquiry in accordance with the provisions of Section 39 and may, subject to the provisions of this Act, make such order in relation to the child as it deems fit.

21. Orders that may be passed regarding delinquent children.—(1) Where a children's court is satisfied on inquiry that a child has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the children's court may, if it so thinks fit,—

- (a) allow the child to go home after advice or admonition ;
- (b) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person on such parent, guardian or other fit person executing a bond, with or without surety as that court may require, for the good behaviour and well-being of the child for any period not exceeding three years ;
- (c) make an order directing the child to be sent to a special school,—
 - (i) in the case of a boy over fourteen years of age or of a girl over sixteen years of age, for a period of not less than three years ;
 - (ii) in the case of any other child, for the period until he ceases to be a child :

Provided that the children's court may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit :

Provided further that the children's court may, for reasons to be recorded, extend the period of such stay, but in no case the period of stay shall extend beyond the time when the child attains the age of eighteen years, in the case of a boy, or twenty years, in the case of a girl ;

(d) order the child to pay a fine if he is over fourteen years of age and earns money.

(2) Where an order under clause (b) or clause (d) of sub-section (1) is made, the children's court may, if it is of opinion that in the interests of the child and of the public it is expedient so to do, in addition make an order that the delinquent child shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the delinquent child :

Provided that if at any time afterwards it appears to the children's court on receiving a report from the probation officer or otherwise, that the delinquent child has not been of good behaviour during the period of supervision, it may, after making such inquiry as it deems fit, order the delinquent child to be sent to a special school.

(3) The children's court making a supervision order under sub-section (2) shall explain to the child and the parent, guardian or other fit person, as the case may be, under whose care the child has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the child, the parent, guardian or other fit person, as the case may be, the sureties, if any, and the probation officer.

(4) In determining the special school, or any person to whose custody a child is to be committed or entrusted under this Act, the court shall pay due regard to the religious denomination of the child to ensure that religious instruction contrary to the religious persuasion of the child is not imparted to him.

22. Orders that may not be passed against delinquent children.—(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent child shall be sentenced to death or imprisonment, or committed to prison in default of payment of fine or in default of furnishing security :

Provided that where a child who has attained the age of fourteen years has committed an offence and the children's court is satisfied that the offence committed is of so serious a nature or that

his conduct and behaviour have been such that it would not be in his interest or in the interest of other children in a special school to send him to such special school and that none of the other measures provided under this Act is suitable or sufficient, the children's court may order the delinquent child to be kept in safe custody in such place and manner as it thinks fit and shall report the case for the orders of the Administrator.

(2) On receipt of a report from a children's court under sub-section (1), the Administrator may make such arrangement in respect of the child as he deems proper and may order such delinquent child to be detained at such place and on such conditions as he thinks fit :

Provided that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed.

23. Proceedings under Chapter VIII of the Criminal Procedure Code not competent against child.—Notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1898 (5 of 1898), no proceedings shall be instituted and no order shall be passed against a child under Chapter VIII of the said Code.

24. No joint trial of child and person not a child.—(1) Notwithstanding anything contained in Section 239 of the Code of Criminal Procedure, 1898 (5 of 1898), or in any other law for the time being in force, no child shall be charged with or tried for, any offence together with a person who is not a child.

(2) If a child is accused of an offence for which under Section 239 of the Code of Criminal Procedure, 1898 (5 of 1898), or any other law for the time being in force, such child and any person who is not a child would, but for the prohibition contained in sub-section (1), have been charged and tried together, the court taking cognizance of that offence shall direct separate trials of the child and the other person.

25. Removal of disqualification attaching to conviction.—Notwithstanding anything contained in any other law, a child who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

26. Special provision in respect of pending cases.— Notwithstanding anything contained in this Act, all proceedings in respect of a child pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the child has committed an offence, it shall record such finding and, instead of passing any sentence in respect of the child, forward the child to the children's court which shall pass orders in respect of that child in accordance with the provisions of this Act as if it has been satisfied on inquiry under this Act that the child has committed the offence.

CHAPTER V

Procedure of competent authorities generally and appeals and revisions from orders of such courts

27. Sitzings, etc., of Boards and children's courts.—
(1) A Board or a children's court shall hold its sittings at such place, on such day and in such manner, as may be prescribed.

(2) A magistrate empowered to exercise the powers of a Board or, as the case may be, a children's court under sub-section (2) of Section 7 shall, while holding any inquiry regarding a child under this Act, as far as practicable, sit in a building or room different from that in which the ordinary sittings of civil and criminal courts are held, or on different days or at times different from those at which the ordinary sittings of such courts are held.

28. Persons who may be present before competent authority.—(1) Save as provided in this Act, no person shall be present at any sitting of a competent authority, except—

- (a) any officer of the competent authority, or
- (b) the parties to the inquiry before the competent authority, the parent or guardian of the child and other persons directly concerned in the inquiry including police officers, and
- (c) such other persons as the competent authority may permit to be present.

(2) Notwithstanding anything contained in sub-section (1), if at any stage during an inquiry, a competent authority considers it to be expedient in the interest of the child or on grounds of decency or morality that any person including the police officers, legal

practitioners, the parent, guardian or the child himself should withdraw, the competent authority may give such direction, and if any person refuses to comply with such direction, the competent authority may have him removed and may, for this purpose, cause to be used such force as may be necessary.

(3) No legal practitioner shall be entitled to appear, before a competent authority in any case or proceeding before it, except with the special permission of that authority.

29. Attendance of parent or guardian of child.—Any competent authority before which a child is brought under any of the provisions of this Act may, whenever it so thinks fit, require any parent or guardian having the actual charge of, or control over, the child to be present at any proceeding in respect of the child.

30. Dispensing with attendance of child.—If, at any stage during the course of an inquiry, a competent authority is satisfied that the attendance of the child is not essential for the purpose of the inquiry, the competent authority may dispense with his attendance and proceed with the inquiry in the absence of the child.

31. Committal to approved place of child suffering from dangerous disease and its future disposal.—(1) When a child who has been brought before a competent authority under this Act is found to be suffering from a disease requiring prolonged medical treatment or physical or mental complaint that will respond to treatment, the competent authority may send the child to any place recognised to be an approved place in accordance with the rules made under this Act for such period as it may think necessary for the required treatment.

(2) Where a child is found to be suffering from leprosy or is of unsound mind, he shall be dealt with under the provisions of the Lepers Act, 1898 (3 of 1898) or the Indian Lunacy Act, 1912 (4 of 1912), as the case may be.

(3) Where a competent authority has taken action under subsection (1) in the case of a child suffering from an infection or contagious disease, the competent authority before restoring the said child to his partner in marriage, if there has been such, or to the guardian, as the case may be, shall where it is satisfied that

such action will be in the interest of the said child call upon his partner in marriage or the guardian, as the case may be, to satisfy the court by submitting to medical examination that such partner or guardian will not re-infect the child in respect of whom the order has been passed.

32. Presumption and determination of age.—(1) Where it appears to a competent authority that a person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a child, the competent authority shall make due inquiry as to the age of that person and for that purpose shall take such evidence as may be necessary and shall record a finding whether the person is a child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a child and the age recorded by the competent authority to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person.

33. Circumstances to be taken into consideration in making orders under the Act.—In making any order in respect of a child under this Act, a competent authority shall take into consideration the following circumstances, namely:—

- (a) the age of the child ;
- (b) the circumstances in which the child is living ;
- (c) the reports made by the probation officer ;
- (d) the religious persuasion of the child ;
- (e) such other circumstances as may, in the opinion of the competent authority, require to be taken into consideration in the interests of the child:

Provided that in the case of a delinquent child, the above circumstances shall be taken into consideration after the children's court has recorded a finding against the child that he has committed the offence :

Provided further that if no report of the probation officer is received within ten weeks of his being informed under Section 19, it shall be open to the children's court to proceed without it.

34. Sending a child outside jurisdiction.—In the case of a neglected or delinquent child whose ordinary place of residence lies outside the jurisdiction of the competent authority before which he is brought, the competent authority may, if satisfied after due inquiry that it is expedient so to do, send the child back to a relative or other person who is fit and willing to receive him at his ordinary place of residence and exercise proper care and control over him, notwithstanding that such place of residence is outside the jurisdiction of the competent authority; and the competent authority exercising jurisdiction over the place to which the child is sent shall in respect of any matter arising subsequently have the same powers in relation to the child as if the original order had been passed by itself.

35. Reports to be treated as confidential.—The report of the probation officer or any circumstance considered by the competent authority under Section 33 shall be treated as confidential :

Provided that the competent authority may, if it so thinks fit, communicate the substance thereof to the child or his parent or guardian and may give such child, parent or guardian an opportunity of producing such evidence as may be relevant to the matter stated in the report.

36. Prohibition of publication of names, etc. of children involved in any proceeding under the Act.—(1) No report in any newspaper, magazine or news sheet of any inquiry regarding a child under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the child, nor shall any picture of any such child be published :

Provided that for reasons to be recorded in writing the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

(2) Any person contravening the provisions of sub-section (1) shall be punishable with fine which may extend to one thousand rupees.

37. Appeals.—(1) Subject to the provisions of this section, any person aggrieved by an order made by a competent authority

under this Act may, within thirty days from the date of such order, prefer an appeal to the court of session :

Provided that the court of session may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) No appeal shall lie from—

(a) any order of acquittal made by the children's court in respect of a child alleged to have committed an offence ; or

(b) any order made by a Board in respect of a finding that a person is not a neglected child.

(3) No second appeal shall lie from any order of the court of session passed in appeal under this section.

38. Revision.—The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or court of session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit :

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard.

39. Procedure in inquiries, appeals and revision proceedings.—(1) Save as otherwise expressly provided by this Act, a competent authority while holding any inquiry under any of the provisions of this Act, shall follow such procedure as may be prescribed and subject thereto, shall follow, as far as may be, the procedure laid down in the Code of Criminal Procedure, 1898 (5 of 1898), for trials in summons cases.

(2) Save as otherwise expressly provided by or under this Act, the procedure to be followed in hearing appeals or revision proceedings under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1898 (5 of 1898).

40. Power to amend orders.—(1) Without prejudice to the provisions for appeal and revision under this Act, any

competent authority may, either on its own motion or on an application received in this behalf, amend any order as to the institution to which a child is to be sent or as to the person under whose care or supervision a child is to be placed under this Act.

(2) Clerical mistakes in orders passed by a competent authority or errors arising therein from any accidental slip or omission may, at any time, be corrected by the competent authority either on its own motion or on an application received in this behalf.

CHAPTER VI

Special offences in respect of children

41. Punishment for cruelty to child.—(1) Whoever, having the actual charge of, or control over, a child, assaults, abandons, exposes or wilfully neglects the child or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such child unnecessary mental and physical suffering shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) No court shall take cognizance of an offence punishable under sub-section (1) unless the complaint is filed with the previous sanction of the Administrator or an officer authorised by him in this behalf.

42. Employment of children for begging.—(1) Whoever employs or uses any child for the purposes of begging or causes any child to beg shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(2) Whoever, having the actual charge of, or control over, a child, abets the commission of the offence punishable under sub-section (1), shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(3) The offence punishable under this section shall be cognizable.

43. Penalty for giving intoxicating liquor or dangerous drug to a child.—Whoever gives, or causes to be given to any child any intoxicating liquor in a public place or any dangerous drug, except upon the order of a duly qualified medical practitioner or in case of sickness or other urgent cause, shall be punishable with fine which may extend to two hundred rupees.

44. Exploitation of child employees.—Whoever ostensibly procures a child for the purpose of any employment and withholds the earnings of the child or uses such earnings for his own purposes shall be punishable with fine which may extend to one thousand rupees.

CHAPTER VII

Miscellaneous

45. Power of Administrator to discharge and transfer children.—(1) The Administrator may, notwithstanding anything contained in this Act, at any time, order a neglected or delinquent child to be discharged from the children's home or special school, either absolutely or on such conditions as he may think fit to impose.

(2) The Administrator may, notwithstanding anything contained in this Act, order—

- (a) a neglected child to be transferred from one children's home to another ;
- (b) a delinquent child to be transferred from one special school to another or from a special school to a borstal school where such school exists or from a special school to a children's home ;
- (c) a child who has been released on licence which has been revoked or forfeited, to be sent to the special school or children's home from which he was released or to any other children's home or special school or borstal school :

Provided that the total period of the stay of the child in a children's home or a special school shall not be increased by such transfer.

(3) The Administrator may, notwithstanding anything contained in this Act, at any time, discharge a child from the care of any person under whom he was placed under this Act either absolutely or on such conditions as the Administrator may think fit to impose.

46. Transfers between children's homes, etc. under the Act, and children's homes, etc., of like nature in different parts of India.—(1) The Administrator of a Union territory may direct any neglected child or delinquent child to be

transferred from any children's home or special school within the Union territory to any other children's home, special school or institution of a like nature in any other State with the consent of the Government of that State.

(2) The Administrator of a Union territory may, by general or special order, provide for the reception in a children's home or special school within the Union territory of a neglected child or delinquent child detained in a children's home or special school or institution of a like nature in any other State where the Government of that State makes an order for such transfer and upon such transfer the provisions of this Act shall apply to such child as if he had been originally ordered to be sent to such children's home or special school under this Act.

47. Transfer of children of unsound mind or suffering from leprosy.—(1) Where it appears to the Administrator that any child kept in a special school or children's home in pursuance of this Act is suffering from leprosy or is of unsound mind, the Administrator may order his removal to a leper asylum or mental hospital or other place of safe custody for being kept there for the remainder of the term for which he has to be kept in custody under the orders of the competent authority or for such further period as may be certified by a medical officer to be necessary for the proper treatment of the child.

(2) Where it appears to the Administrator that the child is cured of leprosy or of unsoundness of mind, he may, if the child is still liable to be kept in custody, order the person having charge of the child to send him to the special school or children's home from which he was removed, or if, the child is no longer liable to be kept in custody, order him to be discharged.

48. Placing out on licence.—(1) When a child is kept in a children's home or special school, the Administrator may, if he so thinks fit, release the child from the children's home or special school and grant him a written licence for such period and on such conditions as may be specified in the licence permitting him to live with, or under the supervision of, any responsible person named in the licence willing to receive and take charge of him with a view to educate him and train him for some useful trade or calling.

(2) Any licence so granted under sub-section (1) shall be in force for the period specified in the licence or until revoked or forfeited by the breach of any of the conditions on which it was granted.

(3) The Administrator may, at any time, by order in writing revoke any such licence and order the child to return to the children's home or special school from which he was released or to any other children's home or special school, and shall do so at the desire of the person with whom or under whose supervision the child has been permitted to live in accordance with a licence granted under sub-section (1).

(4) When a licence has been revoked or forfeited and the child refuses or fails to return to the special school or children's home to which he was directed so to return, the Administrator may, if necessary, cause him to be taken charge of and to be taken back to the special school or children's home.

(5) The time during which a child is absent from a special school or children's home in pursuance of a licence granted under this section shall be deemed to be part of the time for which he is liable to be kept in custody in the special school or children's home :

Provided that when a child has failed to return to the special school or children's home on the licence being revoked or forfeited, the time which elapses after his failure so to return shall be excluded in computing the time during which he is liable to be kept in custody.

49. Provision in respect of escaped children.—Notwithstanding anything to the contrary contained in any other law for the time being in force, any police officer may take charge without warrant of a child who has escaped from a special school or a children's home or from the care of a person under whom he was placed under this Act and shall send the child back to the special school or the children's home or that person, as the case may be ; and no proceeding shall be instituted in respect of the child by reason of such escape but the special school, children's home or the person may, after giving the information to the competent authority which passed the order in respect of the child, take such steps against the child as may be deemed necessary.

50. Contribution by parents.—(1) The competent authority which makes an order for sending a neglected child or a delinquent child to a children's home or a special school or placing the child under the care of a fit person may make an order requiring the parent or other person liable to maintain the child to contribute to his maintenance, if able to do so, in the prescribed manner.

(2) The competent authority before making any order under sub-section (1) shall inquire into the circumstances of the parent or other person liable to maintain the child and shall record evidence, if any, in the presence of the parent or such other person, as the case may be.

(3) The person liable to maintain a child shall, for the purposes of sub-section (1), include in the case of illegitimacy, his putative father :

Provided that where the child is illegitimate and an order for his maintenance has been made under Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), the competent authority shall not ordinarily make an order for contribution against the putative father, but may order the whole or any part of the sums accruing due under the said order for maintenance to be paid to such person as may be named by the competent authority and such sum shall be paid by him towards the maintenance of the child.

(4) Any order made under this section may be enforced in the same manner as an order under Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898).

51. Control of custodian over child.—Any person in whose custody a child is placed in pursuance of this Act shall, while the order is in force, have the like control over the child as he would have if he were his parent, and shall be responsible for his maintenance, and the child shall continue in his custody for the period stated by the competent authority, notwithstanding that he is claimed by his parent or any other person :

Provided that no child while in such custody shall be married except with the permission of the competent authority.

52. Delinquent child undergoing sentence at commencement of the Act.—In any area in which this Act is brought

into force, the Administrator may direct that a delinquent child who is undergoing any sentence of imprisonment at the commencement of this Act shall, in lieu of undergoing such sentence, be sent to a special school or be kept in safe custody in such place and manner as the Administrator thinks fit, for the remainder of the period of the sentence; and the provisions of this Act shall apply to the child as if he had been ordered by a children's court to be sent to such special school or, as the case may be, ordered to be detained under sub-section (2) of Section 22.

53. Appointment of officers.—(1) The Administrator may appoint as many probation officers, officers for the inspection of special schools, children's homes, observation homes or after-care organisations and such other officers as he may deem necessary for carrying out the purposes of this Act.

(2) It shall be the duty of the probation officer—

- (a) to inquire, in accordance with the direction of a competent authority, into the antecedents and family history of any child accused of an offence, with a view to assist the authority in making the inquiry;
- (b) to visit neglected and delinquent children at such intervals as the probation officer may think fit;
- (c) to report to the competent authority as to the behaviour of any neglected or delinquent child;
- (d) to advise and assist neglected or delinquent children and, if necessary, endeavour to find them suitable employment;
- (e) where a neglected or delinquent child is placed under the care of any person on certain conditions, to see whether such conditions are being complied with; and
- (f) to perform such other duties as may be prescribed.

(3) Any officer empowered in this behalf by the Administrator may enter any special school, children's home, observation home or after-care organisation and make a complete inspection thereof in all its departments and of all papers, registers and accounts relating thereto and shall submit the report of such inspection to the Administrator.

54. Officers appointed under the Act to be public servants.—Probation officers and other officers appointed in pursuance of this Act shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

55. Procedure in respect of bonds.—The provisions of Chapter XLII of the Code of Criminal Procedure, 1898 (5 of 1898), shall, as far as may be, apply to bonds taken under this Act.

56. Delegation of powers.—The Administrator may, by general or special order, direct that any power exercisable by him under this Act shall, in such circumstances and under such conditions, if any, as may be specified in the order, be exercisable also by an officer subordinate to the Administrator.

57. Protection of action taken in good faith.—No suit or other legal proceeding shall lie against the Administrator or any probation officer or other officer appointed under this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

58. Act 8 of 1897 and certain provisions of Act 5 of 1898 not to apply.—(1) The Reformatory Schools Act, 1897 (8 of 1897), and Section 29B and Section 399 of the Code of Criminal Procedure, 1898 (5 of 1898), shall cease to apply to any area in which this Act has been brought into force.

(2) The Women's and Children's Institutions (Licensing) Act, 1956 (105 of 1956) shall not apply to any children's home, special school or observation home established and maintained under this Act.

59. Power to make rules.—(1) The Administrator may, by notification in the *Official Gazette*, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the places at which, the days on which, the time at which, and the manner in which, a competent authority may hold its sittings ;

- (b) the procedure to be followed by a competent authority in holding inquiries under this Act; and the mode of dealing with children suffering from dangerous diseases or mental complaints;
- (c) the circumstances in which, and the conditions subject to which, an institution may be certified as a special school or a children's home or recognised as an observation home, and the certification or recognition withdrawn;
- (d) the internal management of special schools, children's homes and observation homes;
- (e) the functions and responsibilities of special schools, children's homes and observation homes;
- (f) the inspection of special schools, children's homes, observation homes and after-care organisations;
- (g) the establishment, management and functions of after-care organisations; the circumstances in which, and the conditions subject to which, an institution may be recognised as an after-care organisation;
- (h) the qualifications and duties of probation officers;
- (i) the recruitment and training of persons appointed to carry out the purposes of this Act and the terms and conditions of their service;
- (j) the conditions subject to which a girl who is a neglected or delinquent child may be escorted from one place to another, and the manner in which a child may be sent outside the jurisdiction of a competent authority;
- (k) the manner in which contribution for the maintenance of a child may be ordered to be paid by a parent or guardian;
- (l) the conditions under which a child may be placed out on licence and the form and conditions of such licence;
- (m) the conditions subject to which children may be placed under the care of any parent, guardian or other fit person under this Act and the obligations of such persons towards the children so placed;
- (n) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this section shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

60. Repeal and savings.—If, immediately before the date on which this Act comes into force in any area, there is in force in that area, any law corresponding to this Act, that law shall stand repealed on the said date:

Provided that the repeal shall not affect—

- (a) the previous operation of any law so repealed or anything duly done or suffered thereunder; or
- (b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.

Probation: - (7) 18 Feb, 1958
Trial examination, a means of
sentencing - 18 Feb, 1958

Appendix II

THE PROBATION OF OFFENDERS ACT, 1958

[Act No. 20 OF 1958]

[16th May, 1958]

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An Act to provide for the release of offenders on probation or after due admonition and for matters connected therewith

Statement of Objects and Reasons.—The question of release of offenders on probation of good conduct instead of sentencing them to imprisonment has been under consideration for some time. In 1931, the Government of India prepared a draft of Probation of Offenders Bill and circulated it to the then Local Governments for their views. However, owing to preoccupation with other more important matters the Bill could not be proceeded with. Later in 1934, the Government of India informed Provincial Governments that there was no prospect of Central legislation being undertaken at the time and there would be no objection to the provinces undertaking such legislation themselves. A few provinces accordingly enacted their own probation laws.

2. In several States, however, there are no separate probation laws at all. Even in States where there are probation laws, they are not uniform nor

are they adequate to meet the present requirements. In the meantime, there has been an increasing emphasis on the reformation and rehabilitation of the offender as a useful and self-reliant member of society without subjecting him to the deleterious effects of jail life. In view of the widespread interest in the probation system in the country, this question has been re-examined and it is proposed to have a Central law on the subject which should be uniformly applicable to all the States.

3. It is proposed to empower courts to release an offender after admonition in respect of certain specified offences. It is also proposed to empower Courts to release on probation, in all suitable cases, an offender found guilty of having committed an offence not punishable with death or imprisonment for life. In respect of offenders under 21 years of age, special provision has been made putting restrictions on their imprisonment. During the period of probation, offenders will remain under the supervision of probation officers in order that they may be reformed and become useful members of society. The Bill seeks to achieve these objects.—Gaz. of Ind., 1957, Extra., Pt. II Sec. 2, page 842.

Be it enacted by Parliament in the Ninth Year of the Republic of India as follows :—

1. Short title, extent and commencement.—(1) This Act may be called the Probation of Offenders Act, 1958.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force in a State on such date as the State Government may, by notification in the *Official Gazette*, appoint, and different dates may be appointed for different parts of the State.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) “Code” means the Code of Criminal Procedure, 1898 (5 of 1898) ;

(b) “Probation officer” means an officer appointed to be a probation officer or recognised as such under Section 13 ;

(c) “Prescribed” means prescribed by rules made under this Act ;

(d) words and expressions used but not defined in this Act and defined in the Code of Criminal Procedure, 1898, (5 of 1898), shall have the meanings respectively assigned to them in that Code.

3. Power of court to release certain offenders after admonition.—When any person is found guilty of having committed an offence punishable under Section 379 or Section 380 or Section 381 or Section 404 or Section 420 of the Indian Penal Code (45 of 1860), or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under Section 4, release him after due admonition.

Explanation.—For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or Section 4.

4. Power of court to release certain offenders on probation of good conduct.—(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour :

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court

shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.

5. Power of court to require released offenders to pay compensation and costs.—(1) The Court directing the release of an offender under Section 3 or Section 4, may, if it thinks fit, make at the same time a further order directing him to pay—

(a) such compensation as the court thinks reasonable for loss or injury caused to any person by the commission of the offence; and

(b) such costs of the proceedings as the court thinks reasonable.

(2) The amount ordered to be paid under sub-section (1) may be recovered as a fine in accordance with the provisions of Sections 386 and 387 of the Code.

(3) A civil court trying any suit, arising out of the same matter for which the offender is prosecuted, shall take into account

any amount paid or recovered as compensation under sub-section (1) in awarding damages.

6. Restrictions on imprisonment of offenders under twenty-one years of age.—When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under Section 3 or Section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under Section 3 or Section 4 with an offender referred to in sub-section (1), the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.

7. Report of probation officer to be confidential.—The report of a probation officer referred to in sub-section (2) of Section 4 or sub-section (2) of Section 6 shall be treated as confidential:

Provided that the court may, if it so thinks fit, communicate the substance thereof to the offender and may give him an opportunity of producing such evidence as may be relevant to the matter stated in the report.

8. Variation of conditions of probation.—(1) If, on the application of a probation officer, any court which passes an order under Section 4 in respect of an offender is of opinion that in the interests of the offender and the public it is expedient or necessary to vary the conditions of any bond entered into by the offender, it may, at any time during the period when the bond is effective, vary the bond by extending or diminishing the duration thereof so, however, that it shall not exceed three years from the date of the original order or by altering the conditions thereof or by inserting additional conditions therein:

Provided that no such variation shall be made without giving the offender and the surety or sureties mentioned in the bond an opportunity of being heard.

(2) If any surety refuses to consent to any variation proposed to be made under sub-section (1), the court may require the offender to enter into a fresh bond and if the offender refuses or fails to do so, the court may sentence him for the offence of which he was found guilty.

(3) Notwithstanding anything hereinbefore contained, the court which passes an order under Section 4 in respect of an offender may, if it is satisfied on an application made by the probation officer that the conduct of the offender has been such as to make it unnecessary that he should be kept any longer under supervision, discharge the bond or bonds entered into by him.

9. Procedure in case of offender failing to observe conditions of bond.—(1) If the court which passes an order under Section 4 in respect of an offender or any court which could have dealt with the offender in respect of his original offence has reason to believe on the report of a probation officer or otherwise, that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may issue a warrant for his arrest or may, if it thinks fit, issue a summons to him and his sureties, if any, requiring him or them to attend before it at such time as may be specified in the summons.

(2) The court before which an offender is so brought or appears may either remand him to custody until the case is concluded or it may grant him bail, with or without surety, to appear on the date which it may fix for hearing.

(3) If the court, after hearing the case, is satisfied that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, it may forthwith—

(a) sentence him for the original offence ; or

(b) where the failure is for the first time, then, without prejudice to the continuance in force of the bond, impose upon him a penalty not exceeding fifty rupees.

(4) If a penalty imposed under clause (b) of sub-section (3) is not paid within such period as the court may fix, the court may sentence the offender for the original offence.

10. Provision as to sureties.—The provisions of Sections 122, 126, 126A, 406A, 514, 514A, 514B and 515 of the Code shall, so far as may be, apply in the case of bonds and sureties given under this Act.

11. Courts competent to make order under the Act, appeal and revision and powers of courts in appeal and revision.—(1) Notwithstanding anything contained in the Code or any other law, an order under this Act may be made by any court empowered to try and sentence the offender to imprisonment and also by the High Court or any other court when the case comes before it on appeal or in revision.

(2) Notwithstanding anything contained in the Code, where an order under Section 3 or Section 4 is made by any court trying the offender (other than a High Court), an appeal shall lie to the court to which appeals ordinarily lie from the sentences of the former court.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the court by which he is found guilty declines to deal with him under Section 3 or Section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the court to which appeals ordinarily lie from the sentences of the former court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under Section 3 or Section 4 in respect of an offender, the Appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law :

Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the court by which the offender was found guilty.

12. Removal of disqualification attaching to conviction.—Notwithstanding anything contained in any other law, a

person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law :

Provided that nothing in this section shall apply to a person who, after his release under Section 4, is subsequently sentenced for the original offence.

13. Probation officers.—(1) A probation officer under this Act shall be—

- (a) a person appointed to be a probation officer by the State Government or recognised as such by the State Government ; or
- (b) a person provided for this purpose by a society recognised in this behalf by the State Government ; or
- (c) in any exceptional case, any other person who, in the opinion of the court, is fit to act as a probation officer in the special circumstances of the case.

(2) A court which passes an order under Section 4 or the district magistrate of the district in which the offender for the time being resides may, at any time, appoint any probation officer in the place of the person named in the supervision order.

Explanation.—For the purposes of this section, a presidency town shall be deemed to be a district and Chief Presidency Magistrate shall be deemed to be the district magistrate of that district.

(3) A probation officer, in the exercise of his duties under this Act, shall be subject to the control of the District Magistrate of the district in which the offender for the time being resides.

14. Duties of probation officers.—A probation officer shall, subject to such conditions and restrictions, as may be prescribed,—

- (a) inquire, in accordance with any directions of a court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the court in determining the most suitable method of dealing with him and submit reports to the court ;
- (b) supervise probationers and other persons placed under

his supervision and, where necessary, endeavour to find them suitable employment ;

- (c) advise and assist offenders in the payment of compensation or costs ordered by the court ;
- (d) advise and assist, in such cases and in such manner as may be prescribed, persons who have been released under Section 4 ; and
- (e) perform such other duties as may be prescribed.

15. Probation officers to be public servants.—Every probation officer and every other officer appointed in pursuance of this Act shall be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

16. Protection of action taken in good faith.—No suit or other legal proceeding shall lie against the State Government or any probation officer or any other officer appointed under this Act in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

17. Power to make rules.—(1) The State Government may, with the approval of the Central Government, by notification in the *Official Gazette*, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely—

- (a) appointment of probation officers, the terms and conditions of their service and the area within which they are to exercise jurisdiction ;
- (b) duties of probation officers under this Act and the submission of reports by them ;
- (c) the conditions on which societies may be recognised for the purposes of clause (b) of sub-section (1) of Section 13 ;
- (d) the payment of remuneration and expenses to probation officers or of a subsidy to any society which provides probation officers ; and
- (e) any other matter which is to be, or may be, prescribed.

(3) All rules made under this section shall be subject to the condition of previous publication and shall, as soon as may be after they are made, be laid before the State Legislature.

18. Saving of operation of certain enactments.—Nothing in this Act shall affect the provisions of Section 31 of the Reformatory Schools Act, 1897 (8 of 1897), or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 (2 of 1947), or the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956), or of any law in force in any State relating to juvenile offenders or borstal schools.

19. Section 562 of the Code not to apply in certain areas.—Subject to the provisions of Section 18, Section 562 of the Code shall cease to apply to the States or parts thereof in which this Act is brought into force.

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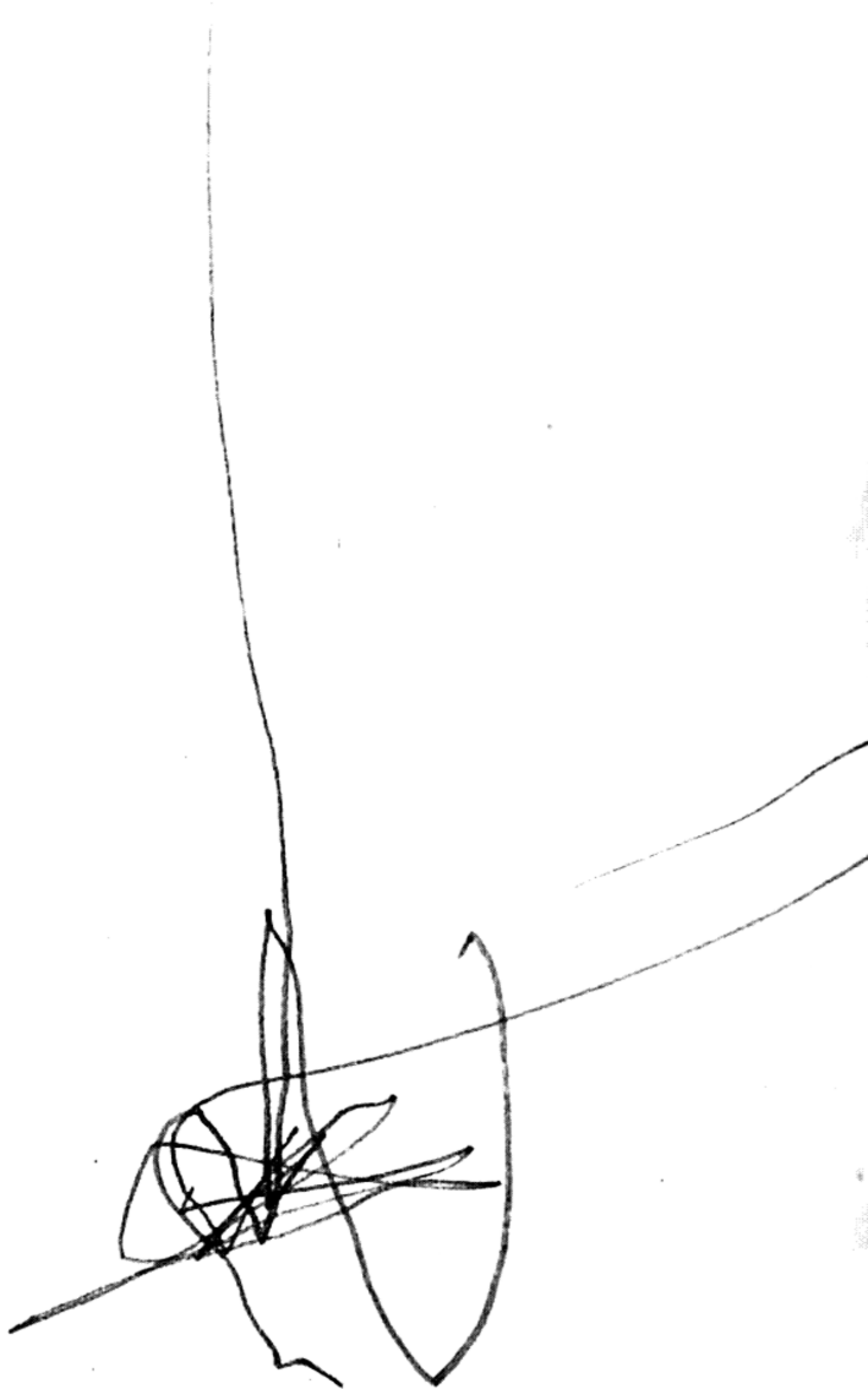
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